Court of Appeal of The Hague
Docket date: 23 December 2014

**STATEMENT OF DEFENSE ON APPEAL TO SHELL'S STATEMENT OF APPEAL (PHASE 1)**

| | case no. | appellants | | respondents | |
|---|---|---|---|---|---|
| a. | 200.126.804 | Fidelis Ayoro Oguru<br>Alali Efanga<br>Vereniging Milieudefensie<br>attorney: Ch. Samkalden, LL.M. | versus | Shell Petroleum N.V.<br>The 'Shell' Transport and Trading Company Ltd.<br>attorney: J. de Bie Leuveling Tjeenk, LL.M. | ORUMA |
| b. | 200.126.834 | Fidelis Ayoro Oguru<br>Alali Efanga<br>Vereniging Milieudefensie<br>attorney: Ch. Samkalden, LL.M. | versus | Royal Dutch Shell plc<br>The Shell Petroleum Development Company of Nigeria Ltd.<br>attorney: J. de Bie Leuveling Tjeenk, LL.M. | |
| c. | 200.126.843 | Eric Barizaa Dooh<br>Vereniging Milieudefensie<br>attorney: Ch. Samkalden, LL.M. | versus | Royal Dutch Shell plc<br>The Shell Petroleum Development Company of Nigeria Ltd.<br>attorney: J. de Bie Leuveling Tjeenk, LL.M. | GOI |
| d. | 200.126.848 | Eric Barizaa Dooh<br>Vereniging Milieudefensie<br>attorney: Ch. Samkalden, LL.M. | versus | Shell Petroleum N.V.<br>The 'Shell' Transport and Trading Company Ltd.<br>attorney: J. de Bie Leuveling Tjeenk, LL.M. | |
| e. | 200.126.849 | Vereniging Milieudefensie<br>attorney: Ch. Samkalden, LL.M. | versus | Royal Dutch Shell plc<br>The Shell Petroleum Development Company of Nigeria Ltd.<br>attorney: J. de Bie Leuveling Tjeenk, LL.M. | IKOT ADA UDO |
| f. | 200.127.813 | The Shell Petroleum Development Company of Nigeria Ltd.<br>attorney: J. de Bie Leuveling Tjeenk, LL.M. | versus | Friday Alfred Akpan<br>attorney: Ch. Samkalden, LL.M. | |

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## 1. INTRODUCTION

1. With this statement of defense on appeal, Milieudefensie et al. are responding to Shell's statement of appeal (phase 1), in which Shell set out its grounds for appeal against the decisions of the District Court of The Hague in connection with jurisdiction and the production of documents. In its statement of appeal, Shell put forward three grounds for appeal that pertain to (i) the decision in the jurisdiction motion rendered by the District Court of The Hague; (ii) the admissibility decision regarding Milieudefensie's claims and (iii) the right of action of the Nigerian plaintiffs that the District Court assumed in the final judgment.

2. Milieudefensie et al. contend first and foremost that Shell's statement of appeal (phase 1) primarily repeats issues that have already been put forward in the first instance (several times). The District Court of The Hague already assessed and dismissed Shell's defenses regarding jurisdiction of the Dutch court and the admissibility of Milieudefensie's claims on two occasions. Shell announced that if necessary, it will raise the same defenses once again in the main action, meaning for the fourth time.[1]

3. Milieudefensie et al. maintain all the arguments they advanced in the first instance; they request that the Court of Appeal considers their arguments to be repeated and included here. This also pertains to the facts and grounds that the District Court did not include in its assessment (in a discernible manner). These facts are either put forward in the discussion of the grounds for appeal, or they are part of the legal battle based on the (positive side of the) devolutive effect of the appeal.

4. For the sake of readability, names and term are not continually further explained in this statement on appeal. The following terms are frequently used:

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| SPDC | The Shell Petroleum Development Company of Nigeria Ltd (in the first instance also: 'Shell Nigeria') |
| RDS | Royal Dutch Shell Plc (in the first instance also: 'Shell Plc') |
| Shell Petroleum | Shell Petroleum N.V. |
| Shell T&T | The 'Shell' Transport and Trading Company Ltd. |
| The parent company | RDS and/or Shell Petroleum and/or Shell T&T (in the first instance also: 'Shell Holding') |

[1] Shell's statement of appeal (phase 1), par. 3; Shell's letter dated 20 June 2014.

| | |
|---|---|
| Dooh | Appellant Dooh. In references to documents and exhibits: the case of Dooh and Milieudefensie against Shell |
| Oguru | Appellant Oguru. In references to documents and exhibits: the case of Oguru, Efanga and Milieudefensie against Shell |
| Akpan | Appellant Akpan. In references to documents and exhibits: the case of Oguru, Efanga and Milieudefensie against Shell |
| The Nigerian plaintiffs or Dooh et al. | Dooh, Oguru, Efanga and Akpan |
| Milieudefensie | Vereniging Milieudefensie |
| Milieudefensie et al. | Milieudefensie, Dooh, Oguru, Efanga and Akpan |
| The English proceedings, or Bodo versus SPDC | The case currently pending between the Bodo Community and others against SPDC before the High Court of Justice, Queen's Bench Division, Technology and Construction Court. |
| The new claim for the production of documents on appeal | The claims for the production of documents filed with this Court of Appeal at the hearing of 10 September 2013 |
| The judgment in the motion to produce documents | The interlocutory judgment of the District Court of The Hague dated 14 September 2011 |
| The final judgment | The judgment of the District Court of The Hague dated 30 January 2013 |

5. In the event that case documents or judgments in the different related cases are (virtually) identical, only the documents or exhibits in one of the proceedings are referred to, namely: Dooh and Milieudefensie against RDS and SPDC. Where necessary, the corresponding passages in the other proceedings are specified.

6. In this statement on appeal, the appellants refer to case documents in the first instance, their new claim for the production of documents on appeal and their grounds for appeal against the judgment in the motion to produce documents in the first instance. They request that the Court of Appeal considers all the appellants' arguments from those previous case documents to be repeated and included here.

## 2. JURISDICTION

### 2.1 Introduction

7. In brief, Shell's jurisdiction defense means that in the first instance, the District Court wrongly established that the claims regarding SPDC and RDS are so connected that from the viewpoint of efficiency by virtue of Section 7 DCCP, a collective hearing is justified. In contrast to what the District Court explicitly concluded in the interlocutory judgment and final judgment, Shell believes that the claim in respect of RDS must be designated as clearly certain to fail; in this light, the District Court should not have felt that it had jurisdiction in respect of the claim against SPDC.

8. By virtue of Section 7 (1) DCCP, the Dutch court that has jurisdiction in respect of a defendant also has jurisdiction in respect of other defendants involved in the proceedings, provided that the claims against the individual defendants are so connected that reasons of procedural efficiency justify having the claims collectively tried. The jurisdiction of the Dutch court in respect of RDS, the Koninklijke and Shell Transport (hereinafter collectively also: 'the parent company') is not in dispute in these proceedings.

9. Milieudefensie et al. contended and substantiated that both SPDC and the parent company are liable for the damage that was caused by the oil spills near Goi, Oruma and Ikot Ada Udo. SPDC failed to properly maintain the pipeline and took insufficient measures to prevent sabotage. The parent company also failed to take measures, even though it was aware of the risks that SPDC took and was involved in SPDC's management. As a result of this negligence on the part of SPDC and the parent company, the oil spill that caused damage for which they are held jointly and severally liable could occur. Milieudefensie et al. refer to their statement of appeal (phase 1) against the judgment in the motion to produce documents in the first instance: in Chapter 2, they set out the legal framework for liability in very great detail.

10. Under Nigerian law, a party is liable based on a *tort of negligence* if it violated a duty of care it was under and damage occurred as a result. This legal ground is the same in the case against RDS and in the case against SPDC. In addition, the same factual framework must be started from in assessing this question. For example, in these proceedings Shell has consistently emphasized that for assessing the question of whether a party is under a duty of care, it is relevant whether the damage occurred as a result of defective materials or through the actions of third parties. The question of whether the parent company on the one hand, and SPDC, on the other, should have taken measures to prevent damage as a result of the oil spills at issue can only be viewed together. The court must not only first factually establish how the oil spills occurred in order to be able to assess whether SPDC or the parent company can be

blamed for negligence in this regard; this also involves the question regarding a consistent course of action in the interreleationship between parent company and subsidiary that covers a period of many years.

11. The District Court also concluded that in the case at issue, SPDC and RDS are held liable for the same damage and that the claims are based on the same complex of facts.[2] The District Court further established that the legal basis of the claims against SPDC and RDS is the same, namely the *tort of negligence*.[3] More in particular, the District Court established that in the event of sabotage, as well, an operator may have a duty of care to limit the risk of sabotage of a specific oil pipeline or oil facility.[4] Moreover, the District Court established that in the event of special circumstances, a parent company can have a duty of care to prevent its (sub-) subsidiary from inflicting damage on third parties through its business operations.[5] The District Court also felt that it was 'foreseeable' for SPDC that it might be summoned in the Netherlands together with RDS in connection with the alleged liability for the oil spills at issue.[6]

## 2.2 Starting points in the application of Section 7 DCCP

12. According to Shell, a number of points of view must be considered in the application of Section 7 (1) DCCP: the interest of the state, on the one hand, and the interest of the parties to the proceedings, on the other.[7] To this end, Shell extensively quotes from Strikwerda's *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2012) (Introduction to Dutch International Private Law), to subsequently conclude that it is not in the interest of the state to "contribute to the administration of justice" in the case in which SPDC is the defendant. However, this conclusion is not supported by the cited passages. The 'points of view' referred to by Strikwerda are not interests that the author believes (should) constitute the basis for (working out) Section 7 (1) DCCP, but are the result of a comparison of existing systems of international jurisdiction rules.[8] The only justified conclusion is that these points of view are also expressed in the Dutch jurisdiction rules, namely in the system of jurisdiction provisions of the Code of Civil Procedure.

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2 District Court of The Hague, judgment in the jurisdiction motion, 24 February 2010, as well as the final judgment dated 30 January 2013 (Dooh).

3 District Court of The Hague 30 January 2013 (Dooh), ground 4.6.

4 District Court of The Hague 30 January 2013 (Dooh), ground 4.46.

5 District Court of The Hague 30 January 2013 (Dooh), grounds 4.31 and 4.33.

6 In which the District Court left aside whether this criterion that has been derived from Article 6(1) of the Brussels Regulation applies at all (*idem* ground 4.6).

7 Shell's statement of appeal (phase 1), par. 16: "Like the other elements of the Dutch jurisdiction rules, Section 7 (1) DCCP is based on concrete "points of view" that regard "interests of the state, on the one hand, and interest of the parties to the proceedings, on the other". If these points of view are not taken into account, the jurisdiction rules of Section 7 (1) DCCP would become too broad."

8 Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2012), p. 213: "A comparison of the different systems of international jurisdiction rules produces a number of general points of view, which can be incorporated in jurisdiction rules in quite different ways."

13. The Dutch legislator opted to explicitly specify the cases in which the Dutch court has international jurisdiction, as in the situation described in Section 7 (1) DCCP. In addition, the Dutch legislator explicitly chose not to give the court the possibility of *not* accepting that jurisdiction if it believes that a different forum would be more suitable.[9] The implementation of the current limitative system of jurisdiction grounds eliminated the need for a *forum non conveniens* restriction:

> In view of the limitative set-up of the first part, the legislator […] felt that in the current rules there is no need whatsoever for a *forum non conveniens* provision. According to the legislator, this means that the Dutch court that has jurisdiction based on one of the provisions of the first part cannot reject this jurisdiction based on the fact that the case has insufficient connection with the jurisdiction of the Netherlands.[10]

14. The same starting point is embedded in the Brussels Convention and the current Brussels Regulation, and expressed in case law of the European Court of Justice (hereinafter: the ECJ) on this.[11] Thus, the District Court of The Hague rightly concluded that:

> However, the *forum non conveniens* restriction no longer plays any role in today's international private law.[12]

15. Milieudefensie et al. further contest the accuracy of Shell's argument that a 'restrictive' interpretation of the scope of Section 7 (1) DCCP will result less frequently in claims being collectively decided than would be the case based on Article 6(1) of the Brussels Regulation.[13] This interpretation is not supported by the case law or literature, or by the (parliamentary history of the) law. The legislator incorporated the ECJ case law regarding Article 6(1) of the Brussels Regulation in Section 7 DCCP.[14] Thus, this case law may be helpful in interpreting the latter section. However, it cannot be inferred from the establishment and development of Section 7 DCCP that the legislator envisaged a more limited interpretation of the jurisdiction rules.[15] On the contrary, in the Explanatory Memorandum to the introduction of the current Section 7 DCCP, the government states:

> The national rules regarding conferring jurisdiction have a somewhat broader scope in general, which is by no means prohibited by the conventions mentioned. In this respect,

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9 Only Section 4 (3), preamble and under b, is an exception to this for requests to provide for custody and contact arrangements.

10 *Tekst & Commentaar Rv* (5th edition) 2012, comments of Polak to preliminary observations to Book 1, Title 1, part 1, p. 6 (comment 8).

11 *Inter alia* ECJ 1 March 2005, *Owusu/Jackson*, par. 38: "Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention, would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine".

12 District Court of The Hague 30 January 2013, ground 4.7.

13 Shell's statement of appeal (phase 1), par. 82, 83.

14 Dutch Lower House 1999-2000, 26855, no. 3 (Review of the procedural law for civil matters, in particular the manner of litigating in the first instance, Explanatory Memorandum), p. 37.

15 Nor does this follow from the judgment of the District Court of Amsterdam that Shell cited in par. 27 of its statement of appeal (phase 1).

> the national legislator should not be too frugal: if the conventions do not apply, in principle, it must be possible to obtain a title in the Netherlands.[16]

16. This is also expressed in the text of the law. Shell rightfully notes that in contrast to the Brussels Regulation, Section 7 DCCP does not stipulate the requirement that one of the defendants is domiciled in the Netherlands.[17] In addition, the legislator opted not to follow the terminology developed by the ECJ, but to use the broader wording of 'reasons of efficiency', derived from Supreme Court case law. The Explanatory Memorandum further demonstrates that Section 7 DCCP is also based on reasons of procedural efficiency.[18]

17. With this case, Milieudefensie, Dooh, Oguru, Efanga and Akpan are attempting to obtain a single court decision in respect of SPDC and the parent company regarding a single complex of acts. They cannot be expected to submit liability of RDS for the oil spills at issue to the court in the Netherlands and to have liability of SPDC for the same oil spills dealt with in Nigeria on the same legal basis. Moreover, it may be clear that this is also undesirable from the viewpoint of procedural efficiency.

### 2.3 Connection: the same factual framework

18. The claims on account of *negligence* against RDS and SPDC are based on the same damage that was caused by the same oil spills. Thus, the claims against these two defendants in the main action are based on the same complex of facts. This means that there is such a connection that reasons of efficiency justify that the claims against RDS and SPDC are collectively decided. This was also confirmed by the District Court in its judgments dated 24 February 2010 and 30 January 2013.

19. In respect of both claims, the factual framework to be assessed focuses on the question regarding how the oil spill occurred, what action was taken to prevent and limit the damage caused by that oil spill and to remediate the land and ponds, and the extent of the damage that was caused by the oil spill. For the question regarding liability of RDS this is the same as for SPDC, although a number of additional questions play a role in the latter case, such as the extent to which RDS was aware of or could have been aware of the risks taken by SPDC and whether RDS was in the habit of intervening in the operations of its subsidiary.

20. Shell's argument that RDS is not involved in the operations of SPDC and that no factual connection can be involved for that reason anticipates its substantive defense and is inappropriate in this motion.[19] In the first instance, the District Court felt that this argument was unconvincing. In response to Shell's grounds for appeal and

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[16] Explanatory Memorandum, Review of procedural law for civil matters, in particular the manner of litigating in the first instance, Dutch Lower House 1999-2000, 26855, no. 3, p. 25.
[17] Shell's statement of appeal (phase 1), par. 32.
[18] Dutch Lower House 1999-2000, 26855, no. 3, p. 37.
[19] Shell's statement of appeal (phase 1) par. 73.

defenses, Milieudefensie et al. will advance a substantive challenge of these arguments – within the boundaries of the legal battle on appeal. The same is true for the argument that RDS was not yet SPDC's parent company at the time the oil spills occurred and for that reason allegedly cannot be held liable for negligence in the remediation.[20] Milieudefensie et al. fail to follow Shell's argument that there cannot be any factual connection if it is not a decisive factor for liability of the parent company whether or not it was informed of the specific oil spills.[21] After all, the issue is that the parent company and SPDC were each negligent in allowing the oil spills in Goi, Oruma and Ikot Ada Udo to occur and failing to properly clean up these oil spills.[22] Moreover, there is not only a connection between the claims against RDS and SPDC, there is also a connection between the claims against SPDC, Shell Transport and Shell Petroleum. All claims are based on the same complex of facts, pertain to the same oil spills and the same damage. There is a reason this Court of Appeal consolidated these cases on the case list.

### 2.4 Connection: the same legal basis

21. Application of Section 7 (1) DCCP or Article 6(1) of the Brussels Regulation does not require that claims have the same legal basis. The ECJ explicitly determined this in respect of the Brussels Regulation in *Freeport/Arnoldsson*.[23] In the recent *Sapir* case, the ECJ further found:

> This identical nature exists even though the legal basis relied on in support of the claim against the eleventh defendant in the main proceedings is different from that on which the action brought against the first 10 defendants is based. As the Advocate General stated, in point 99 of her Opinion, all of the claims relied on in the various actions in the main proceedings are directed at the same interest, namely the repayment of the erroneously transferred surplus amount.[24] [emphasis added by attorney]

22. However, in the case against SPDC and RDS, the claims have *the same* legal basis, i.e. *tort of negligence,* resulting in the oil spills at issue and the damage that resulted from this. It is further obvious that the claims initiated against SPDC and RDS are directed at the same interest.

23. For more specific details of the legal basis of their claims, Milieudefensie et al. refer to their statement of appeal against the dismissal of the motion to produce documents and the legal framework set out in that statement. It is obvious that whether or not a

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[20] Shell's statement of appeal (phase 1), par. 73. For the period prior to the duty of care to clean up, reference is also made to what Milieudefensie noted in the statement of reply, section 2.1.5 (Dooh) regarding the 'paper transition' of the parent companies.

[21] Shell's statement of appeal (phase 1), par. 76, 77.

[22] In par. 78 and 79 as well as in par. 85 *idem*, Shell wrongfully suggests that Milieudefensie et al. take the position that there is no need that the violation of a duty of care for which RDS is blamed resulted in the damage for the claims to be awarded. The passage that Shell cited in that statement on appeal pertains to the criteria developed in *Chandler v Cape* for determining whether a *duty of care* exists, not to the question regarding whether that duty of care was *violated* and whether this also leads to liability.

[23] ECJ 11 October 2007, case no. C-98/06, *NJ* 2008, 80, par. 54.

[24] ECJ, 11 April 2013, C-645/11 (*Sapir*).

defendant violated a duty of care it was under will have to be assessed separately for each defendant. The same is done for a Dutch tort (*onrechtmatige daad*). The question regarding whether they had a duty of care to prevent the oil spills and whether they violated that duty of care is the key question, both for SPDC and for RDS.[25]

## 2.5 Efficiency of deciding the cases collectively on account of connection

24. Under Section 7 DCCP, collectively deciding claims must be justified for reasons of efficiency. According to Milieudefensie et al., the fact that RDS and SPDC are held liable on the same legal basis for the same damage, for which the same complex of facts must be assessed, constitutes sufficient reason to assume that a collective hearing is justified for reasons of efficiency. This was also the conclusion of the District Court of The Hague in its judgments dated 24 February 2010 and 30 January 2013. The District Court rightly found that the fact that all or part of the circumstances on which the claims against RDS and SPDC are based did not occur in the Netherlands is not exceptional and does not detract at all from the efficiency of a collective hearing in the sense of Section 7 DCCP.[26]

25. In the scope of the efficiency to be assessed, with reference to case law regarding Article 6 of the Brussels Regulation, it is frequently reviewed whether there is a risk of irreconcilable judgments if the claims are decided separately.[27] If the claims against RDS and SPDC would be reviewed separately, this gives rise to the risk that different judges arrive at irreconcilable decisions regarding the same factual and legal situation. For example, the court will first have to render a decision regarding the circumstances that resulted in the damage, including the cause of the oil spill, both for the claim against RDS and for the claim against SPDC. After all, Shell argues that to assume liability, at a minimum this oil spill must have been caused by defective materials, because actions by third parties allegedly rule out liability. In addition, the court will have to assess whether the individual parties were negligent in allowing that cause to occur. According to the criteria of *Chandler v. Cape*, the actions of the subsidiary (in addition to those of the parent company) play an important role in assessing liability of the parent company. One of the questions that must be asked in this context is whether the parent company was aware of the fact that the subsidiary accepted certain risks. Thus, the answer to the question regarding what RDS was required to do also depends on the qualification of SPDC's conduct

[25] Shell does not regard this differently. In the statement of defense on appeal in the motion to produce documents (Dooh), Shell contended: "At the center of the case against RDS is the question regarding whether RDS had a *duty of care* in respect of the victims of the oil spill" (par. 125). If at that time, Shell still argued that this question was not a subject of discussion for SPDC, it now argues that: "At the center of the case against SPDC is the question regarding whether SPDC had a *duty of care* in respect of the victims of the oil spills" (Statement of appeal (phase 1), par. 82).

[26] District Court of The Hague, judgment in the jurisdiction motion dated 30 December 2009 (Oguru), ground 3.6.

[27] *Inter alia* the Court of Appeal of Amsterdam 1 April 2008, *JBPR* 2009, 17; ECJ 27 September 1988, *NJ* 1990, 425 (*Kalfelis*).

(acts and omissions), such as the extent and admissibility of creating those risks and/or allowing those risks to continue. Different court decisions can contain different conclusions regarding all these aspects, resulting in divergence in respect of the assessment of the same facts within the same legal framework. In short, there is an actual risk of irreconcilable judgments if the cases are not decided collectively.

26. Shell further argues that the Dutch court should declare a lack of jurisdiction over SPDC the moment it is established that the claims against RDS are insufficient.[28] This can in no way be inferred from Section 7 DCCP, nor is this compatible with the objective of that section. Only after the court has found that it has jurisdiction, can it form a substantive opinion – save for exceptional situations – regarding the admissibility of a claim. If the mere rejection of that claim would mean that in respect of the other defendant, the proceedings would have to be conducted again in another jurisdiction, by definition this is not in the interest of the (procedural) efficiency.[29] After all, the starting point of Section 7 DCCP that in the event of related claims, from the viewpoint of efficiency, the Dutch court may have jurisdiction over defendants for which this would not otherwise be the case, means that there is a chance that the court will only award the claim against this other defendant.

27. We find the same starting points in the case law regarding Article 6(1) of the Brussels Regulation. According to established ECJ case law, the assessment of the question regarding whether a sufficient connection exists between the claims must be conducted according to the time at which the claims are brought before the court.[30] In *Reisch Montage*, the ECJ further found that the application of Article 6(1) of the Brussels Regulation does not depend on the consequences of domestic applicable law. A court that has jurisdiction by virtue of Article 6(1) of the Brussels Regulation also has jurisdiction if that claim is already found inadmissible based on domestic law in relation to the first defendant by the time the claim is filed.[31] The court also has jurisdiction if that claim subsequently becomes null and void. Advocate General Ruiz-Jarabo Colomer explains in his opinion:

> Finally, if a claimant, either by withdrawal or discontinuance, abandons his claim against the party who is domiciled in the jurisdiction of the court seised of the proceedings under Article 6(1), the principle of *perpetuatio jurisdictionis* precludes the alteration of international jurisdiction with the result that the proceedings continue to be heard by the same court. That rule applies where someone summoned to appear in the proceedings is excluded for other reasons.[32] [emphasis added by attorney]

[28] Statement of defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 101.

[29] In the Explanatory Memorandum to the implementation of Section 7 DCCP, the government also explicitly referred to reasons of procedural efficiency. See also Chapter 2.2 above.

[30] ECJ 27 September 1988, *NJ* 1990, 425 (*Kalfelis*).

[31] ECJ 13 July 2006, *Reisch Montage*, C-103/05.

[32] Opinion of Advocate General Ruiz-Jarabo Colomer dated 16 March 2006, *Reisch Montage*, C-103/05.

28. This *perpetuatio jurisdictionis*, or *perpetuatio fori* principle is also the starting point in Dutch case law. In the words of the Court of Appeal of The Hague, this principle implies "that a decisive factor in assuming that the Dutch court has international jurisdiction is the time at which the proceedings in the first instance have been initiated; in the event that this jurisdiction exists at that time, this cannot change during the proceedings".[33] The various Supreme Court rulings demonstrate that in practice, a different view would lead to unworkable results, and would be in breach of legal certainty.[34]

29. Thus, neither Section 7 (1) DCCP nor (case law regarding) the Brussels Regulation offer any support for the view that the jurisdiction of the Dutch court would still cease to exist if it dismisses the claims against RDS.[35] The abolishment of the *forum non conveniens* principle and the principle of legal certainty also demonstrate that a court that has jurisdiction continues to have jurisdiction during the proceedings.

### *2.5.1 Akpan's cross appeal (case f)*

30. The same applies *mutatis mutandis* for Shell's argument that the Dutch court has no (or has no longer) jurisdiction in case f between SPDC as appellant and Akpan as respondent.[36] Shell argues: "in the event that the original plaintiff does not initiate an appeal against the dismissal of the 'anchor claim' against the Dutch defendant, the Court of Appeal must find that the Dutch court cannot (or can no longer) derive any jurisdiction from Section 7 (1) DCCP in respect of the foreign defendant."[37] According to Shell, the Dutch court has no jurisdiction with retroactive effect, because Akpan did not appeal against the Dutch defendant. Shell's line of reasoning means that as a precaution against dismissal of the claim, Akpan should have initiated an appeal <u>against RDS</u> for the sole purpose of retaining jurisdiction of the Dutch court in an appeal that was initiated <u>by SPDC</u>. Such an approach is incompatible with the starting points of procedural law and is undesirable from the viewpoint of (personal and) procedural efficiency. Reasons of procedural efficiency as well as reasons of legal certainty also (in part) form the basis of the *perpetio jurisdictionis* principle. Especially in view of the legal certainty, Akpan cannot be expected not to accept the judgment that is favorable for him, but – on the other hand – is forced to lodge an appeal against the Dutch defendant and accordingly continue the legal battle for the purpose of maintaining the already accepted jurisdiction of the Dutch court in the appeal instance *exclusively* in the event of a possible appeal by SPDC.

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[33] Court of Appeal of The Hague 30 November 2010, ECLI:NL:GHSGR:2010:BO6529. See further HR 18 February 2011, *NJ* 2012, 333; HR 28 May 1999, *NJ* 2001, 212, ground 3.5; HR 9 September 1947, *NJ* 1947, 571; HR 12 June 1925, *NJ* 1925, p. 994.

[34] HR 19 March 2004, *NJ* 2004, 295, ground 3.2.

[35] Thus, Shell's ground for appeal against the final judgment (statement of appeal (phase 1) par. 55) will not succeed.

[36] Shell's statement of appeal (phase 1), Chapter 2.7.

[37] Shell's statement of appeal (phase 1), par. 106.

31. The rulings that Shell cited in this connection cannot lead to a different conclusion. The ruling of the Court of Appeal dated 5 February 1958 dates from long before the introduction of the current Section 7 DCCP and the Brussels Regulation and was rendered in a completely different context. The latter is also true for the ruling of the Court of Appeal of Arnhem-Leeuwarden dated 26 June 2014: in that case, the original *plaintiffs* decided to initiate an appeal against the foreign defendant but not against the Dutch defendant. Moreover, the plaintiffs/appellants in that case had not explained that otherwise, irreconcilable decisions might be involved.[38] This is in contrast to the case at issue: here, the risk of irreconcilable decisions exists regarding Milieudefensie's claim in respect of Ikot Ada Udo, on the one hand, and Akpan's claim, on the other, even though these claims pertain to exactly the same circumstances.

32. The above means that the review framework for the jurisdiction in case f cannot differ from the one in the other connected cases. This Court of Appeal must assess whether at the time the claims were initiated in the first instance, a collective hearing of the cases was desirable from the viewpoint of efficiency.

## 2.6 Foreseeability

33. Milieudefensie et al. take the position that the criterion of foreseeability for SPDC that it might be summoned in the Netherlands does not play a separate role in relation to Section 7 DCCP. The interests of foreseeability and legal certainty mentioned by Shell have already been taken into account in the criteria of Section 7 – in particular the requirement of connection and efficiency. Nor can a general foreseeability criterion be derived from the judgment of the District Court of Amsterdam dated 23 October 2013, which Shell uses as its starting point.[39]

34. The *Painer* judgment of the ECJ from 2011 cited by Shell pertains to a copyright law issue.[40] It cannot be inferred from this judgment that the ECJ attaches a general requirement of foreseeability to Article 6(1) of the Brussels Regulation. In *Painer*, the ECJ found as follows:

> 80. However, in assessing whether there is a connection between different claims, that is to say a risk of irreconcilable judgments if those claims were determined separately, the identical legal bases of the actions brought is only one relevant factor among others. It is not an indispensable requirement for the application of Article 6(1) of Regulation No 44/2001 (see, to that effect, Freeport, paragraph 41).

[38] Court of Appeal of Arnhem-Leeuwarden 24 June 2014, ECLI:NL:GHARL:2014:5020, ground 4.13.

[39] District Court of Amsterdam 23 October 2013, ECLI:NL:RBAMS:2013:7936. The District Court refers to the interests of foreseeability and legal certainty, but to assess its jurisdiction does not conduct any foreseeability review. This case did not involve the same factual or legal basis of the claims. The District Court did not assess at all whether or not it was foreseeable for the foreign party that he would be summoned in the Netherlands.

[40] ECJ 11 December 2011, C-145/10 (*Painer*).

> 81. Thus, a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled (see, to that effect, Freeport, paragraph 47).[41]

35. The ECJ attaches the condition of foreseeability to the situation in which the claims filed against the different defendants have different legal bases. In so doing, the ECJ did not adopt the proposed answer of Advocate General Trstenjak to the question that was referred for a preliminary ruling. The Advocate General's findings from which Shell believes it can infer that a foreseeability criterion plays a "decisive role" in assessing factual or legal connection lack relevance. Firstly because Section 7 DCCP applies rather than Article 6 of the Brussels Regulation; secondly because the ECJ did not follow the Advocate General in this. [42]

36. Moreover, the factual background of the *Painer* case cannot be ignored. In that case, a number of German and Austrian publishers had published photographs of Natascha Kampusch independently of one another, without mentioning the copyright owner. They were collectively sued for copyright infringement before the Austrian court, but outside these proceedings, they did not have any relationship whatsoever. It was in this connection that Advocate General Trstenjak found that "the conduct of the anchor defendant and of the other defendant concerns the same or similar legal interests of the applicant and is similar in nature, but occurs independently and without knowledge of one another. In such a case of unconcerted parallel conduct, it is not sufficiently predictable for the other defendant that he can also be sued, under Article 6(1) of the regulation, at a court in the place where the anchor defendant is domiciled."

37. Milieudefensie et al. believe that the criterion of 'foreseeability' does not play any role within the context of Section 7 DCCP, but note superfluously that it was most certainly foreseeable for SPDC that it could be sued in the Netherlands. After all, the issue in Milieudefensie et al.'s claims is the conduct of SPDC and RDS, considered together. The Netherlands is not a random location in this, but the place where SPDC's parent company is established. For years, interested parties and NGOs have called both SPDC and RDS to account for the consequences of the Nigeria policy.

38. The District Court of The Hague also felt that it was foreseeable for SPDC – explicitly leaving aside the fact regarding whether that criterion even applies – that it might be summoned in the Netherlands. In that connection, the District Court referred to the international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent

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41 *Idem.*

42 Shell's statement of appeal (phase 1), par. 64-71.

company on several occasions.[43] This development is described in greater detail in the thesis of Enneking and in a later article that she wrote.[44]

39. SPDC is not required to have examined these scientific articles to be aware of the trend mentioned above. Even apart from this broader international trend, SPDC could have reasonably estimated the chances that it might be summoned in the Netherlands. In view of the national and international pressure on SPDC and the parent company on account of Shell's acts and omissions in Nigeria, SPDC could foresee that it might be sued on this account, together with and in the jurisdiction of its parent company. In 1996, Shell was already sued before the *United States District Court* on account of violations of human rights in Nigeria.[45] In 1999, Shell's competitor in Nigeria, Chevron Texaco, was also sued in the home country of the parent company, the United States, for violations of human rights in Nigeria.[46] RDS and SPDC are also involved in legal proceedings in the United Kingdom, where RDS has its registered office, on account of negligence in allowing oil spills to occur near the village of Bodo in Nigeria.[47] The statement of appeal against the judgment in the motion to produce documents already referred to the case of *Ontario Superior Court of Justice* in *Choc v. Hudbay Minerals Inc*, in which a foreign subsidiary was summoned in Canada together with its Canadian parent company (and the court held that it had jurisdiction).[48]

## 2.7 Assumed insufficiency of the claim against RDS

40. In light of the proceedings in the first instance and the judgments of the District Court of The Hague, Shell's argument that the claim against RDS is (was) allegedly 'obviously insufficient' and 'certain to fail beforehand' lacks each and every ground.[49] After all, the District Court accepted that under Nigerian law, the parent company may be liable; subsequently, following a factual assessment of the situation (wrongly according to Milieudefensie et al.), the District Court concluded that this liability does not exist *in the case at issue*. In this light, Milieudefensie et al.'s claims cannot be called certain to fail, let alone 'obviously' certain to fail.

41. Moreover, both Shell and Milieudefensie et al. announced that they would direct grounds for appeal against the application of Nigerian law. From the viewpoint of the focus of the procedural discussion and due process on appeal, it would be unacceptable if in anticipation of those grounds for appeal and defenses, which

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43 Final judgment (Dooh), ground 4.6, with reference to Enneking in *NJB* 2010, pp. 400-406.

44 L.F.H. Enneking, *Foreign Direct Liability and Beyond*, Utrecht 2012; reference is made especially to the cases mentioned in Chapter 3. See further also: L.F.H. Enneking, '*Zorgplichten van multinationals in Nederland - 'Second best' zo slecht nog niet?*', *NJB* 2013, 607.

45 In the end, the case of *Ken Saro-Wiwa* was settled for a considerable amount. This was followed later with the case of *Kiobel* against Shell regarding the same factual circumstances, also in New York.

46 *Bowoto v. Chevron Texaco* (no. 09-15641 D.C. No.3:99-cv-02506-SI).

47 In this case, SPDC accepted the jurisdiction of the English court.

48 *Choc v. Hudbay Minerals Inc*. [2013] ONSC 1414 (**Exhibit O7**).

49 Shell's statement of appeal (phase 1), Chapter 2.3.

pertain to the central issue of the proceedings, this Court of Appeal would already assume a lack of jurisdiction of the Dutch court in the main action.

42. It follows from ECJ case law that in assessing its jurisdiction by virtue of Article 6(1) of the Brussels Regulation, the national court should not include the chance of success of a claim. The same applies based on Section 7 (1) DCCP. The ECJ found in *Reisch Montage*:

> 30. Consequently, since it is not one of the provisions, such as Article 59 of Regulation No 44/2001, for example, which provide expressly for the application of domestic rules and thus serve as a legal basis therefor, Article 6(1) of the Regulation cannot be interpreted in such a way as to make its application dependent on the effects of domestic rules.
>
> 31. In those circumstances, Article 6(1) of Regulation No 44/2001 may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant.[50]

43. In his opinion, Advocate General Ruiz-Jarabo Colomer substantiated this starting point as follows:

> First, after confirming the validity of the procedural connection, the court must establish that it has jurisdiction, which is not dependent on the admissibility of the action or on a substantive examination of the main issue of the case, namely the viability of the claim.

44. The question regarding "whether it is likely that *in the case at issue*, circumstances occur that may lead to liability of the parent company under Nigerian law"[51] is the same as a request for a substantive (re-) examination of the viability of the claim; certainly in the appeal phase, this cannot possibly lead to the conclusion that in the first instance, the District Court should have considered that it was *obvious* that the claim was certain to fail.

45. Completely superfluously, Milieudefensie et al. add the following to this. Both in the interlocutory judgment dated 24 February 2010 and in the final judgment dated 30 January 2013, the District Court responded to Shell's argument that the claim in respect of RDS must be deemed to be 'obviously insufficient'. In both cases, the District Court concluded that this is not the case. In the final judgment dated 30 January 2013, the District Court extensively addressed the case of *Chandler v. Cape* and the District Court reviewed whether the criteria for liability of a parent company set out in *Chandler v. Cape* had been satisfied. In Chapter 2.7 of their statement of appeal against the judgment in the motion to produce documents, Milieudefensie et al. once again set out the legal framework and explained why they believe that this should lead to the conclusion that RDS is liable based on *negligence*. In any event,

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50 ECJ 13 July 2006, C-103/05 (*Reisch Montage*). See also the AG's opinion dated 14 March 2006, par. 32.
51 Shell's statement of appeal (phase 1), par. 35 (emphasis added by Shell's attorney).

the decision in *Chandler v. Cape* – as well as the final judgment of the District Court – demonstrates that under Nigerian law, a parent company may be liable if it fails to intervene in the operations of its subsidiary. In that case, no *lifting the corporate veil* is involved, because the parent company is deemed responsible for its own omissions.[52]

46. Thus, the court will have to review whether the principles of *Chandler v. Cape* apply and whether in the case at issue, as well, the parent company must be held liable. To this end, the factual circumstances must be weighed, for example to answer the question asked in *Chandler v. Cape* regarding whether the parent company intervened more often and whether it was aware or should have been aware of the risks that were being taken. The District Court assesses these criteria extensively in grounds 4.33 to 4.39 of its judgment dated 30 January 2013. Without a further review on appeal, it is not possible to determine whether in the case at issue, as well, the parent company can still be held liable. For this reason alone, Milieudefensie et al. believe that it should be maintained that no 'obvious insufficiency' of the basis of the claim against RDS is involved. In any event, the factual circumstances advanced by Shell,[53] which are contested by Milieudefensie et al., cannot be used as the basis for any finding regarding the viability of the claim as long as the discussion on this subject in the main action has not been conducted.

47. In this context it is irrelevant that – as Shell argues – Nigerian case law allegedly does not include any example of a case involving the exact same situation as the one in the case at issue. Naturally, each case is distinguished by its own details and circumstances. The case of *Chandler v. Cape* offers the most specific leads for the claim against RDS, but is not the only case from which liability of the parent company can be inferred. This may also be demonstrated by the extensive discussion of relevant case law in the first instance that dates from before the Court of Appeal's ruling in *Chandler v. Cape.* The decision in *Chandler v. Cape* was *inter alia* based on the cases of *Caparo Industries plc v. Dickman*[54] and *Smith v. Littlewoods.*[55] Moreover, it is typical of the *common law* system that – in the absence of a statutory provision – the court will have to apply principles of existing case law to a new situation. In his *Tort law* handbook (2006), Tony Weir notes the following in this context:

> Whereas in a Statute every word is law, the precise words of judges are not law at all, but merely an indication of it. […] In order to discover what a decision is an authority for, one must first understand the relevant facts, and analyse the decision in the light of those facts, ignoring asides (obiter dicta). The aim is to ascertain the rule (the ratio decidendi) that the judge must have had in mind in order to reach his decision. Then one must decide whether that rule is applicable to the case in hand, which depends on

[52] Thus, Shell's comments regarding *lifting the corporate veil* are irrelevant (statement of defense on appeal, par. 87-90).
[53] Shell's statement of appeal (phase 1), par. 52-54.
[54] *Caparo Industries plc v. Dickman* [1990] UKHL 2, AC 605
[55] *Caparo Industries plc v. Dickman* [1990] UKHL 2, AC 605; *Smith* v. *Littlewoods Organisation Ltd* [1987] UKHL 3, AC 241.

> whether its facts are different enough to enable the prior decision to be 'distinguished'; if so, the judge may disregard the prior decision or, if he thinks it right, extend it to the case in hand.[56]

48. This is also precisely what the judge did in the case *Thompson v. The Renwick Group*[57] that Shell submitted with the statement of appeal. Tomlinson LJ compares the facts that were established in that case to the facts and principles from *Chandler v. Cape*, to subsequently conclude that the Renwick Group did not have any duty of care. In contrast to *Chandler v. Cape*, Renwick's parent company was no more than a holding company; apart from the fact that it owned shares, it did not have anything whatsoever to do with the operations of its subsidiary or with the processing of asbestos. The fact that this is different *in the case at issue* may be demonstrated in the main action and provisionally from Chapter 2 of Milieudefensie et al.'s statement of appeal. However, more important is the finding that only after assessing the facts can the court assess if and to what extent the criteria of *Chandler v. Cape* apply and whether the parent company had a duty of care.

49. Recently, the English court concluded in the case of the *Bodo Community and Others* versus *SPDC* that Article 11(5)(b) of the *Oil Pipelines Act* can also entail liability for damage from oil spills that were caused by sabotage.[58] The judgment of Justice Akenhead in that case confirms the legal arguments that Milieudefensie et al. advanced in these proceedings; in that light, as well, it may be clear that those arguments advanced by Milieudefensie et al. are not far-fetched, as Shell suggests.

50. The Dutch court applying *common law* rules of law can only do this in the same manner as an English or Nigerian court. Thus, the court will have to examine the principles that must be derived from the case law. After all, this follows from the *common law* system, in which the rules of law are not (all) embedded in acts, but for the most part are formed by judges. Shell wrongfully suggests that with such a work method, the Dutch court would be guilty of unauthorized development of law.[59] The fact that the Dutch court possibly will not apply Nigerian law in the same manner as a Nigerian court in all respects is an accepted consequence of the system of legal actions from which international jurisdiction arises. In that connection, the District Court of Amsterdam recently found as follows:

> It can be admitted to Akzo et al. that the cultures of different countries may differ to such an extent that this District Court, in as far as foreign law applies, may not consistently apply the applicable law in the same manner as a court of the country where that law applies. However, this possibility, which will be smaller as the parties inform the court in simple, clear and objective terms regarding the applicable law and the application of that law in the jurisdiction in question, arises from the system of Article 6(1) of the Brussels Regulation; in view of the above, this is insufficient for a

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56 Tony Weir, *An introduction to Tort Law* (Oxford University Press: 2006) p. 8.

57 Exhibit 49 (Shell).

58 **Exhibit O1**; and further see the statement of appeal (in the motion to produce documents) of Milieudefensie et al., par. 28 and following.

59 Shell's statement of defense on appeal in the motion by virtue of Section 843a DCCP, also containing motion for the court to decline jurisdiction and transfer the case, par. 90-100.

different conclusion regarding the jurisdiction of the District Court based on Article 6(1) of the Brussels Regulation.[60]

51. A Dutch court will also have to assess based on *common law* whether the starting points developed in the case law apply in a specific case.[61] The court is perfectly able to do so without subsequently excessively expanding those principles. Moreover, the conclusion would not have been essentially different had a civil law system been involved *in the case at issue*. The suggestion that there is no Nigerian ruling that pertains *exactly* to the situation at issue and that this implies that liability of the parent company is impossible under Nigerian law is in any event too far-fetched and untenable. Superfluously: the *praeteritio* with which Shell nevertheless anticipates 'phase 2' in case f / Akpan (cf. statement of appeal, par. 24–26) cannot support that conclusion, either.

## 2.8 No abuse of procedural law

52. Shell's invocation of (the lack of jurisdiction as a result of) abuse of procedural law must also be dismissed.[62]

53. First of all, Milieudefensie et al. point out that Shell's suggestion that as a result of abuse of procedural law, the Dutch court allegedly no longer has jurisdiction over SPDC is incorrect.[63] On the contrary, the ECJ case law referred to above demonstrates that Article 6(1) of the Brussels Regulation even applies if a claim that is obviously certain to fail is brought against the defendant who is domiciled in the state of the court seised. Nor does the case law require that it is established that the claim was not brought solely for the purpose of creating jurisdiction in respect of a different defendant.[64] However, neither of these situations is at issue in this case.

54. Shell's argument that the claim against RDS is allegedly *obviously certain to fail* must fail; please refer to what is noted in this respect in Chapter 2.7 above. In their statement of appeal (phase 1) against the judgment in the motion to produce documents, Milieudefensie et al. extensively discussed the basis of their claim against the parent company.[65] In light of what was discussed in that statement, as well as in light of the extensive hearing in the first instance and the District Court's conclusions in its judgment dated 30 January 2013, it cannot be concluded now that the claim against RDS is obviously insufficient, or that based on the invoked facts and circumstances, Milieudefensie et al. allegedly abused procedural law. The (re-) assessment of the possible admissibility of the claim against RDS must be conducted within the boundaries of the legal battle on appeal as defined by the grounds for appeal.

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60 District Court of Amsterdam 4 June 2014, ECLI:NL:RBAMS:2014:3190.
61 See further the motion by virtue of Section 843a DCCP and the opinion of Rob Weir, Exhibit N2.
62 Shell's statement of appeal (phase 1), Chapter 2.6.
63 Shell's statement of appeal (phase 1), par. 99-100.
64 ECJ 11 October 2007, C-98/06 (*Freeport/Arnoldson*) *NJ* 2008, 80, par. 54.
65 Milieudefensie's statement of appeal (phase 1), Chapter 2.7.

55. Milieudefensie et al. further contest the accuracy of Shell's suggestion that this Court of Appeal should start from a broader interpretation of abuse of procedural law if access to the court is possibly open in another country.[66] Shell believes that Milieudefensie et al. are abusing procedural law "according to objective standards" by "filing claims against RDS without a proper basis in the applicable law".[67] This extremely broad interpretation of abuse of procedural law is certainly not accepted in the (international) legal practice; it also goes against the starting point used in the case law that abuse of procedural law can only be involved in exceptional cases.[68] Moreover, the proposed interpretation is in breach of the principle of legal certainty underlying the limitative list of jurisdiction grounds in which the *forum non conveniens* restriction was abandoned.[69]

56. The review of whether the Dutch court has jurisdiction must be conducted based on the applicable statutory provision. It is incompatible with these starting points that – as Shell argues – the court could nevertheless simply render a jurisdiction ground inoperative by means of an interpretation in which the mere fact that proceedings can be initiated abroad allegedly constitutes abuse of procedural jurisdiction in the Netherlands. Superfluously it is noted that the review used is thus irrelevant for the conclusion that Milieudefensie et al. did not abuse procedural law.

## 3. ADMISSIBILITY OF MILIEUDEFENSIE'S CLAIMS (3:305A DCC)

57. In Ground for Appeal 2, Shell takes the position that Milieudefensie's claims by virtue of Section 3:305a DCC should be declared inadmissible. Briefly summarized, Shell principally argues that Section 3:305a DCC does not even apply, because the admissibility of Milieudefensie's claims must be determined under Nigerian law, while this Nigerian law does not grant Milieudefensie any collective right of action. Alternatively, Shell contends that Milieudefensie's claims should be declared inadmissible because for various reasons, Milieudefensie does not satisfy the requirements of Section 3:305a DCC. Milieudefensie contests these points of view held by Shell.

### 3.1 Section 3:305a is a rule of Dutch procedural law

58. Milieudefensie maintains its arguments from the first instance regarding the procedural law nature of Section 3:305a DCC.[70] Milieudefensie adds the following to this.

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66 Milieudefensie's statement of appeal (phase 1), par. 98-99.
67 Milieudefensie's statement of appeal (phase 1), par. 95.
68 *Inter alia* HR 29 June 2007, *NJ* 2007, 353; see also the District Court of The Hague in the jurisdiction motion in the first instance (Dooh), grounds 3.2-3.3.
69 See Chapter 2.5 above.
70 Statement of reply in the motion to produce documents (Dooh), par. 147-198; statement of reply in the main action (Dooh) par. 77-79.

59. The case at issue is substantively assessed according to Nigerian law; however, as the *lex fori*, Dutch law applies to procedural law questions. According to the literature and the parliamentary history, Section 3:305a DCC is a rule of Dutch procedural law, so that the admissibility of Milieudefensie's claims is assessed based on that section. The District Court of The Hague rightfully arrived at the same conclusion.[71] In that connection, the District Court *inter alia* refers to the parliamentary history of this section. In contrast to what Shell contends in this regard in par. 112 of its statement of appeal, the sources to which the District Court refers demonstrate that the legislator includes section 3:305a DCC among the rules of civil procedural law. After all, in those passages the legislator describes the possibility for Dutch and foreign organizations to initiate a claim before the Dutch court by virtue of Sections 3:305a and 3:305c DCC, irrespective of the applicable law. For example, the following is noted regarding Section 3:305(4) DCC:

> However – <u>just like many other procedural law provisions</u> – this provision does not affect the admissibility of the plaintiff's claim; for that reason, it is compatible with Article 4(1) of the directive.[72] [emphasis added by attorney]

60. The procedural law nature of the section can also be inferred from the passage of the parliamentary history that Shell cites in par. 113 of its statement of appeal:

> If a class action does not offer any advantage over litigating in the name of the interested parties themselves in a concrete situation, preference should be given to the latter action. <u>After all, this is a deviation from the normal rule of civil procedural law</u> to the effect that you represent your own interests and that other parties cannot do so without your permission.[73] [emphasis added by attorney]

After all, by contending that section 3:305a DCC constitutes a deviation from the normal procedural rules, the legislator explains that the section is part of that procedural law.

61. With the introduction of Section 3:305 DCC, the legislator explicitly did not envisage introducing a new substantive law liability standard. His intention was "[o]nly to improve the procedural possibility to sue someone based on a breach of already existing standards".[74] In other words, Section 3:305a DCC only pertains to the procedural authority of a party representing others to initiate proceedings.

62. In the first instance, Milieudefensie also argued that the position of the section in Title 3.11 DCC does not give rise to any argument regarding the law that applies to that provision.[75] In addition to those previous arguments, Milieudefensie notes here that the position of the section in Book 3 can be explained by the close connection between procedural and substantive law for the provisions contained in that book.

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71 Judgment in the motion to produce documents (Dooh) ground 4.4; Final judgment (Dooh) ground 4.12.
72 Parliamentary Papers II 26693, no. 3, p. 8.
73 Parliamentary Papers II 22486, no. 3, p. 23. Cited by Shell in its statement of appeal (phase 1), par. 113.
74 Parliamentary Papers II 22486, no. 3, p. 19.
75 Statement of reply in the motion to produce documents (Dooh), par. 125-128.

> [T]he authors of the new Civil Code felt that the legal actions to which a party is entitled are so closely connected to personal rights that a special title had to be devoted to the subject in Book 3. Accordingly, substantive law and procedural law are connected.[76]

63. Asser also notes that this title with provisions regarding legal actions deviates from the system of the old civil code. What is relevant in this choice of the legislator is the "close connection between personal rights and legal action"; according to Asser, this connection is expressed in the opening section of Title 3.11.[77] Thus, the sections in Title 3.11 are of a special nature and therefore cannot be compared to the rest of the provisions in Book 3 without reservation. The District Court of The Hague rightly found that the case law demonstrates that sections from Title 3.11 also apply in cases in which foreign law applied in substantive terms.[78]

64. In short, as far as the legislator and judge are involved, Section 3:305a DCC is a procedural law rule. The fact that Nigerian law substantively applies to the case at issue is without prejudice to the applicability of the section.

### 3.2 Nigerian law offers room for a class action

65. Alternatively, Milieudefensie maintains its point of view that Nigerian law also offers the possibility for an organization like Milieudefensie to lodge a class action.[79] In this connection, Milieudefensie refers to Chapter II of Professor Duruigbo's legal opinion.[80] Duruigbo explains that even though previously, admissibility was rigidly approached in Nigeria, in the new millennium a "new liberalized legal environment for enforcing human rights"[81] is involved in which the door to the court is open for interest groups like Milieudefensie.[82]

66. The *Fundamental Rights (Enforcement Procedure) Rules* dated 11 November 2009 (hereinafter: the FREP Rules (2009)) stipulate the parties that can initiate human

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[76] Comments SDU to the Code of Civil Procedure, Book 3, Section 296, 'Chapter C: Key problems' (comments updated up to 02-01-2013).

[77] C. Asser, *Handleiding tot de beoefening van het Nederlands burgerlijk recht: Verbintenissenrecht, De verbintenis in het algemeen* (Kluwer Deventer: 2004), p. 593. "In contrast to the system of the old code, a number of provisions regarding legal actions have been included in Title 3.121. The close connection between personal rights and legal action is expressed in Section 3:296 (…)".

[78] Judgment in the motion to produce documents (Dooh) ground 4.4. See in this connection also the District Court of Breda 9 July 2008, ECLI:NL:RBBRE:2008:BD6815, in which the District Court explicitly finds that the application of Section 3:305c DCC is not limited to cases in which Dutch law is invoked.

[79] Statement of reply in the motion to produce documents (Dooh), par. 82-84; Written pleadings (Dooh), par. 22.

[80] Exhibit M1 (Dooh), par. 40-44 ('II. Locus Standi of Plaintiff Milieudefensie'). See on this subject also the expert opinion of Professor M.T. Ladan and Dr. R.T. Ako, Exhibit L1 (Dooh), par. 21.

[81] Exhibit M1 (Dooh), par. 40, 43.

[82] See in this connection also, for example: E.P. Amechi, 'Litigating the right to healthy environment in Nigeria', 6/3 LAW ENVIRONMENT AND DEVELOPMENT JOURNAl, 322-334, p. 330-331 ('3.2. Liberalisation of the locus standi Rule in Human Rights Litigation'), http://www.lead-journal.org/content/10320.pdf (visited on: 21 December 2014).

rights claims. To emphasize how far the FREP Rules (2009) are intended to extend, Milieudefensie refers to the text of the preamble:

> 1. The Court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially whenever it exercises any power given it by these Rules or any other law and whenever it applies or interprets any rule (…)
>
> 3. The overriding objectives of these Rules are as follows (…)
>
> (e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following (…)
>
> (iv) Anyone acting in the public interest, and
>
> (v) Association acting in the interest of its members or other individuals or groups [emphasis added by attorney]

According to the FREP Rules (2009), *public interest* means: "the interest of Nigerian society or any segment of it in promoting human rights and advancing human rights law".

67. In view of these developments in Nigerian law, Milieudefensie fails to understand why Shell maintains in its statement of appeal that Nigerian law does not offer any basis for a class action for the interests of others (statement of appeal (phase 1), par. 111). After all, it is clear that Milieudefensie is conducting a *public interest* lawsuit in the sense of the FREP Rules (2009) in which it represents the interests of (all) Nigerians whose right to a clean living environment has been infringed by the oil spills at issue.[83]

## 3.3 Milieudefensie satisfies the requirements of Section 3:305a DCC

68. The District Court rightly found that Milieudefensie satisfies the requirements of Section 3:305a DCC.[84] Shell contests this and argues that Milieudefensie does not satisfy the requirements of section 1, and that there are objections from the Goi community in the sense of section 4.

69. As a supplement and further explanation to its points of views and defenses already expressed, Milieudefensie notes the following.

### *3.3.1 Effective and efficient legal protection*

70. Shell principally contends that effective legal protection is allegedly not served by 'Milieudefensie's action'. Shell is referring to the criterion that the class action must

[83] Milieudefensie et al.'s statement of appeal against the judgment in the motion to produce documents, par. 18-22.

[84] Judgment in the motion to produce documents (Dooh) ground 4.5; final judgment (Dooh) grounds 4.13-4.14.

offer added value over individual dispute resolution as expressed in the parliamentary history and the case law preceding Section 3:305a DCC. The Explanatory Memorandum includes the following in this regard: "[i]f a class action does not offer any advantage over litigating in the name of the interested parties themselves in a concrete situation, preference should be given to the latter action".[85]

71. As the parliamentary history also demonstrates, this criterion is provided by including the passage that the protection of similar "interests of other persons" must be involved in Section 3:305a DCC.[86] This requirement is satisfied if the interests that the legal action seeks to protect can be bundled, promoting an efficient and effective legal protection for the interested parties.[87] Thus, the legislator did not opt to add a provision to Section 3:305a DCC stipulating that it is only possible to litigate on the basis of that section if it is first established that this litigation method will be more effective or efficient, but created the right for organizations to initiate a class action based on that section as long as this action seeks to represent *similar interests of other persons*. Shell's argument "that there is only room for an action by virtue of Section 3:305a DCC if this results in more effective legal protection" is not supported in the parliamentary history or case law.[88] In fact, it is the other way round: the legislator found that a class action serves efficiency and effective legal protection if it seeks to protect similar interests of other persons that can be bundled.

72. In the first instance, in the judgment in the motion to produce documents and in the final judgment, the District Court found:

> However, the District Court maintains that a number of Milieudefensie et al.'s claims clearly rise above the individual interest of (only) Dooh, because remediating the soil, cleaning up the fish ponds, purifying the water sources and preparing an adequate contingency plan for future responses to oil spills – if ordered – will benefit not only Dooh, but the rest of the community and the environment in the vicinity of Goi, as well. Given that many people may be involved, litigating in the name of the interested parties may most certainly be objectionable.[89]

73. In these proceedings, Milieudefensie represents the interests of the environment and of the victims of the oil spills. Its claims pertain to a declaratory judgment, as well as to taking measures that are to remedy environmental damage and prevent this in the future. Thus, first of all, its claims seek to protect the environment and the environmental interests of (all) victims of the oil spills around Goi, Oruma and Ikot Ada Udo. Its claims to take measures that are to prevent new oil spills seek to protect the much larger group of inhabitants of the Niger Delta.

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85 Dutch Lower House 1991-1992, 22486, no. 3, p. 23.
86 Dutch Lower House 1991-1992, 22486, no. 3, p. 22, last paragraph.
87 *Inter alia* HR 26 February 2010, ECLI:NL:HR:2010:BK5756.
88 Shell's statement of appeal (phase 1), par. 113.
89 Final judgment (Dooh), ground 4.13; judgment in the motion to produce documents (Dooh), ground 4.5.

74. Thus, with its claims, Milieudefensie is protecting similar interests of other persons who are not involved in these proceedings.[90] Even if this group would be exclusively limited to the people directly affected by the oil spills near Goi, Oruma and Ikot Ada Udo – which is not the case – those interests can already be bundled in a claim by virtue of Section 3:305a BW.

75. In his note to the Supreme Court ruling in *Plazacasa*, Snijders notes:

> This efficiency and effective legal protection can be promoted, irrespective of the question regarding whether members of the group are known (…) In the event of a very small group of interested parties, it is certainly justified to ask whether bundling will not have more disadvantages than advantages. I believe that a decisive factor will continue to be (…) whether a substantial number of individual interests are involved that are similar or – in other words – not so diffuse that they can be included in a single judicial decision without any problem.[91]

76. In the case law it has been found on several occasions that the added value of Section 3:305a actions to represent this type of similar, bundled interests can be found in the fact that in that case, "a decision can be handed down in a single lawsuit regarding the points in dispute and claims raised by the legal action, without the need to include the special circumstances on the part of the individual interested parties in this."[92] In the current proceedings, Milieudefensie submitted to the court that Shell has been both negligent in allowing oil spills to occur and in remedying oil spills; for that reason, Shell must take measures to prevent further environmental damage. This is in the interest of everyone who is affected by this environmental damage. One look at Shell's (repeated) defenses regarding the individual plaintiffs in terms of their right of action, admissibility, etc., emphasizes the applicability of the above advantage described by the Supreme Court. In addition, nowhere near all the inhabitants of the areas affected by the pollution (in the Niger Delta) are able to protect their interests in law. In the case of Clara Wichmann versus the State (regarding the SGP lists of candidates), the Court of Appeal of The Hague found that cost considerations may also play a role in initiating a class action.[93]

77. Whether or not the claim at issue could also have been initiated by way of representative action or by or on behalf of the local communities – as Shell contends

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[90] Also see, for example, the statement of reply in the motion to produce documents (Dooh), par. 131: "[Shell's argument that purely individual interests are represented] "is based on the incorrect assumption that Milieudefensie only acts to represent the 'alleged damage (…) suffered by members of (clans from) the Goi community.' As demonstrated by (…)'s writ of summons, in these proceedings Milieudefensie is acting to protect the environmental interests of other persons, whose interests have been violated as a result of the environmental pollution caused by the [oil spills at issue]. This *inter alia* involves a claim for fulfillment that relates to the future: preventing new oil spills and implementing an adequate plan to respond to oil spills in Nigeria."

[91] Note by H.J. Snijders to HR 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Plazacasa*), *NJ* 2011, 473, par. 2a.

[92] HR 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Plazacasa*), ground 4.2; District Court of Noord-Holland, 20 February 2013, ECLI:NL:RBNNE:2013:BZ1615, ground 4.1.6.

[93] Court of Appeal of The Hague 20 December 2007, ECLI:NL:GHSGR:2007:BC0619, ground 3.2; see also the statement of reply in the motion to produce documents (Dooh), par. 40.

– is irrelevant. After all, only the question regarding whether Milieudefensie's claim seeks to protect similar interests of other persons that can be bundled is to be assessed. Moreover, Shell does not contest the latter.

78. Moreover, to substantiate its argument, Shell refers to Nigerian legislation and case law that does not apply here. With its suggestion that one or more members of the Goi, Oruma or Ikot Ada Udo community can act on behalf of the relevant community by means of documents appointing a representative *ad litim* ,[94] Shell first of all fails to recognize that the Dutch legislator created Section 3:305a DCC specifically for representative actions,[95] and further that the interests that Milieudefensie represents in these proceedings rise above those of the individual (members of the) local communities, as the District Court also found in the first instance.[96] Not only are the victims of the oil spills near Goi, Oruma and Ikot Ada Udo not necessarily limited to the relevant communities; Milieudefensie's claims that seek to prevent future damage also protects the interests of inhabitants of the Niger Delta who have not (yet) suffered any damage from the oil spills, but who are likely to do so. This is true in particular for the claim moving that Shell must implement an adequate oil response plan.

79. One important advantage of the class action from Section 3:305a DCC is that this action can be used to obtain "a general order to comply".[97] The legislator said the following in this regard with the introduction of the section:

> The fact that an interest group also acts as plaintiff alongside an individual person most certainly offers advantages. After all, assuming that the group's claim is deemed inadmissible for another reason, the defendant must comply with the ruling towards everyone whose interest is represented by the interest group. For this reason, the claim of an interest group that acts in legal proceedings alongside a natural person will not be declared inadmissible based on the alternative nature of the class action right, as this action most certainly has advantages over litigating only in the name of a natural person.[98]

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94 Shell's statement of appeal (phase 1), par. 115.

95 On the other hand, English law recognizes a representative action similar to that recognized in Nigeria; thus, it is hardly surprising that – as Shell notes in footnote 106 – the Bodo proceedings are conducted based on that representative action.

96 Judgment in the motion to produce documents (Dooh), ground 4.5; final judgment (Dooh), ground 4.13. Thus, to the extent that in its statement of appeal (phase 1), Shell exclusively focuses on the interests of the Goi, Oruma and Ikot Ada Udo communities (for example in par. 116, 118), this is based on an incorrect notion of the interests involved in these proceedings. With regard to the alleged (representative) proceedings in Ikot Ada Udo (*idem* par. 126), Shell noted that (i) no such proceedings have been demonstrated – as the District Court also found in the judgment in the *lis pendens* motion – and (ii) that this would not detract from the admissibility of Milieudefensie's claims by virtue of Section 3:305a DCC, either. See also the statement of reply in the motion to produce documents (Dooh), par. 178.

97 Dutch Lower House 1991-1992, 22486, no. 3, p. 11.

98 Dutch Upper House 1993-1994, 22486, no. 103b, p.1. See in this connection also the statement of reply in the motion to produce documents (Dooh), par. 141-142, which, with reference to the parliamentary history of the *Wet Collectief Actierecht*, discusses that it is customary in proceedings such as the ones at issue for an interest group to act in addition to an individual person.

80. With reference to the Explanatory Memorandum to the amendment of Section 3:305a DCC, Shell also contends that for a claim by virtue of that section, the interests of persons who are represented in the class action must be sufficiently guaranteed. As Shell noted, the new Section 3:305a DCC came into force in 2013 and therefore does not apply. Nor does Shell argue that the new Section 3:305a DCC applies to the situation at issue. However, Shell cites abundantly from the Explanatory Memorandum and applies the criteria set out in this memorandum to Section 3:305a DCC (old). The fact that according to the Explanatory Memorandum, the legislative amendment served to "stipulate more stringent access requirements" and for this purpose introduced the criterion mentioned (thus, in order to explicitly change the scope of Section 3:305a DCC) already demonstrates that considerations from that Explanatory Memorandum cannot possibly be used to interpret Section 3:305a DCC (old).[99]

81. Moreover, having said that, there can be no doubt that the interests of the persons that are represented by the action are sufficiently guaranteed. According to the Explanatory Memorandum, in the amendment of Section 3:305a DCC, the legislator first of all was thinking of commercially driven foundations that had been founded *ad hoc*.[100] As will be explained in more detail below, for years, Milieudefensie has been standing up for the environment and the interests of victims of oil pollution, in particular including the (habitants of the) Niger Delta. According to par. 120 of its statement of appeal, Shell believes that the interests of the communities of Goi, Oruma and Ikot Ada Udo would benefit even more from a different litigation method. First of all, this can hardly be interpreted as an expression of commitment to those interests; secondly, it is not up to Shell to determine this and thirdly, this is irrelevant for the admissibility of Milieudefensie's claims.

82. Nor does the passage from the Explanatory Memorandum to the legislative amendment of Section 3:305a DCC from which Shell derives that (to assess the question of whether the interests of persons are sufficiently guaranteed) it is relevant whether a judgment can be enforced abroad apply to the admissibility of Milieudefensie's claims.

83. It is pointed out that *inter alia* with its argument that any claims for damages to be initiated would have become time-barred under Nigerian law in the interim, Shell conveniently forgets that Milieudefensie's claims also and specifically pertain to taking measures.[101] In these proceedings, Milieudefensie further contended and substantiated that after the oil spills at issue occurred, Shell failed to properly clean up, as a result of which the tort still continues in effect and therefore cannot have become time-barred.

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[99] Dutch Lower House 2011–2012, 33126, no. 3, p. 12.
[100] Dutch Lower House 2011–2012, 33126, no. 3, p. 12.
[101] Thus, the circumstances differ considerably from those in the case from which Shell cites so abundantly in par. 124 of its statement of appeal (phase 1) (i.e.: District Court of Amsterdam, 15 January 2014 ECLI:NL:RBAMS:2014:489).

### *3.3.2 No 'local interest' criterion*

84. The District Court rightly concluded that "nor is there sufficient reason to assume that local environmental damage abroad allegedly falls outside that description of Milieudefensie's objective or outside the effect of Section 3:305a DCC."[102] According to Shell, this conclusion by the District Court is "incorrect", but Shell fails to substantiate its argument with any reference to literature, parliamentary history or case law. Thus, there is no basis whatsoever for Shell's argument that Section 3:305a DCC is allegedly not intended to initiate a claim in connection with (environmental) damage abroad. The term 'local interest' is a term that is used with the 'interested party' concept in administrative law; the term does not apply to a civil action by virtue of Section 3:305a DCC.[103]

85. On the contrary, the parliamentary history demonstrates that Sections 3:305a-3:305c also created the possibility for foreign organizations to represent the interests of persons domiciled in that country.[104]

86. Thus, Milieudefensie contests the accuracy of Shell's point of view that the admissibility of its claims allegedly depends on a connection with Dutch jurisdiction.[105] Such a criterion simply does not exist in the context of Section 3:305a DCC. What Shell is attempting to do here, in fact, is to cloak its jurisdiction defense behind the admissibility defense. Milieudefensie further contends that Milieudefensie's action "does not have any connection with Dutch jurisdiction". After all, Milieudefensie summoned the Dutch parent company, because it holds this parent company (in part) liable for the damage that was caused by the oil spills. The belief that the Dutch parent company should assume responsibility for the considerable environmental damage that it caused in Nigeria is an essential and principal point of Milieudefensie's claim. Milieudefensie contends that to a significant extent, the Dutch parent company determines how (not) to act in Nigeria; its claim *inter alia* serves to order both the Dutch parent company and SPDC to take measures to prevent any further damage.

### *3.3.3 Objectives in charter and actual work*

87. In the first instance, the District Court rightly concluded that the description of Milieudefensie's objective in its charter is to promote environmental protection worldwide, and that although this is a comprehensive objective, this does not mean that it is insufficiently specific. In this connection, the District Court further found that it considers "conducting campaigns aimed at stopping environmental pollution in the production of oil in Nigeria as a factual activity that Milieudefensie developed to promote the environmental interests in Nigeria". Currently, Shell once again

[102] Judgment in the motion to produce documents (Dooh) ground 4.5; final judgment (Dooh) ground 4.13.
[103] See also the statement of reply in the motion to produce documents (Dooh), par. 144-145.
[104] For example, Dutch Lower House 1998-1999, 26693, no. 3, p.6.
[105] Statement of reply in the motion to produce documents (Dooh), par. 144-145.

contends that Milieudefensie's claims are inadmissible given that the description of its objective in the charter does not specifically pertain to the environment near Goi, Oruma and Ikot Ada Udo.[106] Shell further argues that the actual work that Milieudefensie developed in the Niger Delta to realize the objective described in its charter cannot contribute to the determination that Milieudefensie's claims are admissible by virtue of Section 3:305a DCC.

88. Milieudefensie's objective is described as follows in Article 2.1 of its Charter:

> The objective of the association is to contribute to solving and preventing environmental problems and preserving cultural heritage, as well as to aim for a sustainable society, all this at a global, national, regional and local level, in the broadest sense and in the interest of the members of the association and in the interest of the environmental quality, nature and countryside in the broadest sense for current and future generations.[107]

89. This objective of Milieudefensie in its charter is not so broad that it is impossible to determine the contents based on the description,[108] or whether in these proceedings, Milieudefensie can represent the interests of the victims of the oil spills.[109]

90. With its claims in the case at issue, Milieudefensie has expressed that it represents the environment in the Niger Delta and the interests of the victims of the oil spills near Goi, Oruma and Ikot Ada Udo. For example, Milieudefensie moves for a declaratory judgment to the effect that Shell acted unlawfully in respect of these victims; in addition, Milieudefensie moves *inter alia* that Shell takes measures to prevent any further oil pollution as a result of oil spills. Thus, its claims seek to protect the environmental interests of the people who are directly affected, while it also follows from the nature of its claims that it represents a general environmental interest that cannot be individualized. The parliamentary history and case law demonstrate that a class action by virtue of Section 3:305a DCC does not have to pertain exclusively to the interests of a specific group of persons, but may also pertain to a general or idealistic interest.[110] Such an interest can only be expressed in connection with a claim for persons having legal capacity who are protected by private law, as was done in the case at issue. See in this connection also Advocate General Langemeijer in his opinion for SGP/Clara Wichman:

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[106] Shell's statement of appeal (phase 1), par. 130.
[107] Exhibit F1 (Dooh).
[108] Cf. Frenk, cited in Shell's statement of appeal (phase 1), par. 130.
[109] Cf. District Court of Amsterdam 26 February 2014, ECLI:NL:RBAMS:2014:818, ground 3.3, cited in Shell's statement of appeal (phase 1), par. 131.
[110] That such an interest also comes under Section 3:305a DCC is *inter alia* demonstrated by the Court of Appeal of The Hague 14 February 2014, ECLI:NL:GHDHA:2014:412 (*Privacy First*); HR 9 April 2010, ECLI:NL:HR:2010:BK4549 (*SGP/Clara Wichman*) and the opinion of AG Langemeijer for the ruling in *SGP/Clara Wichman*, ECLI:NL:PHR:2010:BK4547, par. 3.6. See also *Tekst & Commentaar BW* (9th Edition), comments of Stolker to Section 3:305a, p. 1886 (note 2); District Court of Breda 15 August 2012, ECLI:NL:RBBRE:2012:BX5098, ground 3.7; District Court of Amsterdam 13 March 2013, ECLI:NL:RBAMS:2013:BZ4174 (*Clara Wichman/UvA*), ground 4.2.

> In a class action before the civil court, general interests can only be indirectly protected, namely by linking these interests to the interests of persons having legal capacity who are protected by private law.[111]

91. The fact that the description of Milieudefensie's objective in its charter may be more encompassing than covered by its current claims does not alter the admissibility of its claims by virtue of Section 3:305a DCC. The issue is that there is a certain connection between the description of the objective in the charter and the claim at issue;[112] a general objective offers the possibility of representing specific interests that fall within that objective.[113] The oil spills at issue and the damage caused by these oil spills are symptomatic for the broader environmental problem in Nigeria. This means that the proceedings most certainly coincide with the description of Milieudefensie's objectives in its charter.

92. Advocate General Langemeijer found, again in his opinion for SGP/Clara Wichman: "as long as the description of the objectives in the charter permits and the actual work of the foundation or association is in line with this, an action by virtue of Section 3:305a DCC may pertain to virtually any social subject."[114] In contrast to what Shell suggests in its statement of appeal,[115] the case law demonstrates that the specific (environmental) interests of Goi, Oruma or Ikot Ada Udo do not have to be included in Milieudefensie's charter.[116]

93. In answering the question regarding whether the connection required for admissibility sufficiently exists, the manner in which that description of the objectives in the charter is implemented in practice is examined. In other words, activities for promoting those objectives must have been demonstrably developed. After all, to the extent that a legal entity did not undertake any activities apart from conducting the proceedings at issue, the requirement of representing interests by virtue of the charter stipulated in the section would become an empty shell.[117]

94. According to Article 2.2 of Milieudefensie's Charter, it attempts to realize the objectives in Article 1.1 *inter alia* by:

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[111] Opinion of AG Langemeijer for *SGP/Clara Wichman*, ECLI:NL:PHR:2010:BK4547, par. 3.6. See further District Court of Amsterdam 13 March 2013, ECLI:NL:RBAMS:2013:BZ4174 (*Clara Wichman/UvA*), ground 4.2.

[112] District Court of The Hague 13 May 2009, ECLI:RBSGR:2009:BI3727, ground 5.3; District Court of Amsterdam 9 January 2013, ECLI:NL:RBAMS:2013:BY8038, ground 4.6. See also HR 9 April 2010, ECLI:NL:HR:2010:BK4547 (*SGP/Clara Wichman*), grounds 4.3.2-4.3.3.

[113] District Court of Noord-Holland 20 February 2013, ECLI:NL:RBNNE:2013:BZ1615, ground 4.1.4.

[114] Opinion of AG Langemeijer for the ruling in *SGP/Clara Wichman*, ECLI:NL:PHR:2010:BK4547, par. 3.6. See also his discussion of the meso and macro level, *idem* par. 3.15.

[115] Shell's statement of appeal (phase 1), par. 130.

[116] District Court of The Hague 13 May 2009, ECLI:RBSGR:2009:BI3727, ground 5.3; District Court of Noord-Holland 20 February 2013, ECLI:NL:RBNNE:2013:BZ1615, ground 4.1.4; District Court of The Hague, 9 May 2014 ECLI:NL:RBDHA:2014:5657 (regarding 'voter selfies'), ground 3.3; District Court of Amsterdam 13 March 2013, ECLI:NL:RBAMS:2013:BZ4174 (*Clara Wichman/UvA*), ground 4.2.

[117] District Court of The Hague 13 May 2009, ECLI:NL:RBDHA:2009:BI3727, ground 5.3; District Court of Amsterdam, 26 February 2014, ECLI:NL:RBAMS:2014:818, ground 3.3, also referred to by Shell, see Shell's statement of appeal (phase 1), par. 131.

> Critically following all those developments in society that have an impact in the area of the environment, nature, landscape and durability, influencing the decision-making process in this regard by using all appropriate and permitted means, conducting research or having this done, distributing and providing information in the broadest sense, obtaining judicial rulings and performing all acts and actions that the association deems necessary to realize its objective.

95. The District Court in the first instance rightly found that conducting campaigns aimed at stopping environmental pollution in Nigeria can be considered to be a factual activity that Milieudefensie developed to promote the environmental interests in Nigeria.[118] The current proceedings and previous proceedings in which Milieudefensie was involved are a way in which Milieudefensie implements its objective as mentioned in Article 2.2 of the Charter.

96. Shell is now once again arguing that the activities mentioned by way of example in the first instance cannot justify the conclusion that Milieudefensie conducted any actual work to promote the interests it seeks to protect. Thus, Shell wrongfully assumes that the work of Milieudefensie aimed at environmental pollution by Shell in the Niger Delta, but not specifically at Goi, Oruma and Ikot Ada Udo, cannot be considered to be relevant work.[119] Milieudefensie further refers to what it advanced in its statements in the first instance.[120]

97. Shell also contends that the activities that Milieudefensie mentioned in the first instance by way of example allegedly do not qualify as "sufficient actual work", because protest campaigns do not qualify as such,[121] or are not activities conducted by Milieudefensie,[122] and further that the activities are not directed at the relevant communities themselves.[123] As Shell is sufficiently aware, for 20 years Milieudefensie has been developing actual work in its battle against the manner in which Shell conducts its oil operations in Nigeria. Moreover, of the examples given in the first instance,[124] which include activities that Milieudefensie developed together with other branches of *Friends of the Earth International*, it was always clear that this was not an exhaustive list.[125]

98. Moreover, the legislator does not stipulate any requirements for the specific form that the actual work must take. Shell may believe that Milieudefensie should have chosen other methods to realize its objective;[126] this does not alter the fact that Milieudefensie most certainly developed actual work – in a manner in line with the

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118 Judgment in the motion to produce documents (Dooh) ground 4.5; final judgment (Dooh) ground 4.13.
119 Shell's statement of appeal (phase 1), par. 136, 140, 141.
120 Statement of reply in the motion to produce documents (Dooh), par. 146 and following.
121 Shell's statement of appeal (phase 1), par. 138.
122 Shell's statement of appeal (phase 1), par. 140, 141.
123 Shell's statement of appeal (phase 1), par. 142.
124 Statement of reply in the motion to produce documents (Dooh), par. 152.
125 See the statement of reply in the motion to produce documents (Dooh), par. 152, and the reference to other actions of Milieudefensie included in footnote 109.
126 Shell's statement of appeal (phase 1), par. 137.

nature of the association as an 'action platform'. Milieudefensie notes the following in addition to the above.

99. Milieudefensie's campaign against the oil pollution by Shell in Nigeria has been running for over 20 years now. Since 1993, Milieudefensie has continually employed one or more people who exclusively work on the file regarding the oil pollution in Nigeria. In connection with these problems, Milieudefensie maintains contacts with people's representatives and with the Dutch government, organizes information and protest meetings, conducts research in collaboration with other organizations and publicly expresses its opinion regarding the problems. Milieudefensie does the latter *inter alia* in the media, by means of study reports, protest campaigns and in the scope of stakeholder meetings that Milieudefensie organizes itself as the occasion arises. Milieudefensie further holds shares in Shell, based on which it uses its speaking right during Shell shareholders' meetings.

100. Moreover, in previous years, Milieudefensie has attempted to consult and/or negotiate with Shell – to no avail – to get the group to conduct its oil production operations in Nigeria in an environmentally-friendly manner. Such meetings are *inter alia* referred to in Milieudefensie's (annual) documents,[127] and in the overview of campaigns directed against Shell through the years, which can be viewed at Milieudefensie's website.[128]

101. In connection with Shell's suggestion that reports that were mentioned in the first instance do not qualify as work of Milieudefensie,[129] Milieudefensie finally notes that both the '**Lessons Not Learned: The Other Shell Report'** (2004) and the '*Use Your Profits to Clean Up Your Mess*' report (2007) most certainly constitute work of Milieudefensie itself.[130] These reports have been prepared in part on behalf of Milieudefensie Nederland, and have been written in part by Milieudefensie Nederland.[131]

### 3.4 Alleged objection by Goi community irrelevant and non-existing

102. First and foremost, Milieudefensie contends that Shell's argument that the Goi community allegedly objects to the proceedings at issue – which Milieudefensie

[127] Milieudefensie's 1995 Annual Report, pp. 15-16 and Milieudefensie's *In Actie* magazine, February 1996 (regarding consultations and negotiations between Milieudefensie and Shell, and starting up the lobby platform 'Ogoni consultations'; Milieudefensie's 1996 Annual Report, p. 17 (regarding interview with Shell CEO Herkströter in 1997). See also Milieudefensie's 1998 Annual Report (**Exhibits P1-P4**).

[128] 'Campaigns directed against Shell through the years' (2005-2010) (**Exhibit P5**), also available via Milieudefensie's website. See, for example, '*Gedupeerden Shell in gesprek met topman Van der Veer*' (6 December 2005) (**Exhibits P6**).

[129] Shell's statement of appeal (phase 1), par. 141.

[130] Statement of reply in the motion to produce documents (Dooh), par. 152.

[131] One of the editors of the 'Lessons Not Learned' report (2004) is Myrthe Verweij, an employee of Milieudefensie, while the preface was in part written by the director of Milieudefensie, Vera Dalm. 'Use Your Profits …' was coordinated by Meike Skolnik of Milieudefensie, while Kees Kodde and Anne van Schaik were co-editors. From 2005-2009, Van Schaik held the portfolio regarding the oil pollution in Nigeria at Milieudefensie.

contests – is in any event without prejudice to the fact that Milieudefensie's claims in these proceedings are admissible.

103. Firstly, applicability of the fourth sub-section of Section 3:305a DCC does not result in inadmissibility (as the District Court wrongly seems to assume),[132] but only in the possible consequence that the claim can possibly not be *based* on the conduct that is objected to.[133]

104. Secondly, the parliamentary history and case law unambiguously demonstrate that Section 3:305a DCC does not recognize any requirement of representativity.[134] The requirement of similarity of interests does not mean "that all persons whose interest the interest group claims to represent must want the same thing."[135] The Supreme Court found in that connection:

> In and of itself, the fact that part (whether significant or not) of the persons whose interests a class action seeks to protect does not agree with (the objective of) the legal action or even adopts an opposite point of view does not stand in the way of the conclusion that the claim seeks to protect similar interests. In that case, as well, it is sufficient that the interests that the legal action seeks to protect can be bundled, so that an efficient and effective legal protection is encouraged. As demonstrated by the parliamentary history, set out under 12 and 13 in the Advocate-General's opinion, the legislator deliberately decided not to include representativity of the legal entity that acts as the plaintiff as a condition in the law, so that the requirement that the class action can rely on the support of a significant part of the qualifying interested parties cannot be stipulated. In this context, it is relevant that persons who do not want a court decision that was obtained by means of the class action to have effect in their respect can withdraw from the scope of that decision by virtue of the fifth sub-section of Section 3:305a (save the exception mentioned at the end of sub-section 5).[136]

105. Superfluously, it is recalled that prior to the pleadings in the first instance, Milieudefensie submitted a statement by the Goi community that demonstrates that no objection on the part of that community is involved. This means that the District Court rightly considered the issue dealt with.[137] Shell's elaborate attempt to refute that conclusion of the District Court is artificial and fails to recognize the obvious intention of the statement.[138]

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[132] Final judgment (Dooh), ground 4.14.

[133] As already demonstrated by the quote from the explanatory memorandum mentioned previously: "However – just like many other procedural law provisions – this provision does not affect the admissibility of the plaintiff's claim; for that reason, it is compatible with Article 4(1) of the directive." (Parliamentary Papers II 26693, no. 3, p. 8).

[134] Dutch Lower House 1991-1992, 22 486, no. 3, p. 22; further *inter alia* HR 9 April 2010, ECLI:NL:HR:2010:BK4549 (*SGP/Clara Wichman*); District Court of Amsterdam 13 March 2013, ECLI:NL:RBAMS:2013:BZ4174 (*Clara Wichman/UvA*); HR 26 February 2010, ECLI:NL:HR:2010:BK5756 (*Plazacasa*).

[135] Opinion of AG Langemeijer for the *SGP/Clara Wichman* ruling, ECLI:NL:PHR:2010:BK4547, par. 3.3.

[136] HR 26 February 2010, ECLI:NL:HR:2010:BK5756, ground 4.2.

[137] Final judgment (Dooh) ground 4.14.

[138] Shell's statement of appeal (phase 1), Chapter 3.6.

106. Completely superfluously, Milieudefensie submits an additional statement as **Exhibit P7**. This statement once again explicitly demonstrates that the Goi community – and Eric Barizaa Dooh, as well – fully support Milieudefensie.

## 4 ADMISSIBILITY OF ERIC DOOH'S APPEAL

107. Shell argues that Eric Dooh's appeal is inadmissible. Even though strictly speaking, this does not involve a ground for appeal, Shell explicitly maintains its arguments in this regard in its statement of appeal (par. 10). For that reason, Milieudefensie will briefly address these arguments.

108. Barizaa Manson Tete Dooh died during the proceedings in the first instance. His son Eric Dooh continued the proceedings on appeal. "For lack of knowledge, Shell contests that Eric Dooh is Dooh's sole heir or that he has become the sole rightful claimant to the claims that Dooh initiated in the first instance for any other reason (…) that Eric Dooh's appeal is admissible".[139] Subsequently, in brief, Shell's argument means that Shell believes it can assume that Dooh is litigating on behalf of the community (of heirs) based on Section 3:171 DCC; however, in that case his appeal is inadmissible because he failed to express this in so many words in the notice of appeal. If Eric Dooh is not litigating on behalf of the community, Shell also concludes that his appeal is inadmissible, because he allegedly failed to demonstrate that in his capacity as heir, he is entitled to continue the proceedings.

109. Shell's admissibility defense is based on substantive Dutch law that does not apply in the case at issue. Moreover, Shell did not contend or substantiate that or why based on applicable Nigerian law, Eric Dooh's appeal in the proceedings of his late father is allegedly inadmissible. Below, Milieudefensie will explain that and why Eric Dooh currently is the rightful claimant to the claims initiated in the first instance and authorized to conduct these proceedings.

110. In contrast to what Shell argues, Section 3:171 DCC is not a procedural law rule that falls under the *lex fori* to be applied. The same is true for the Dutch case law based on that section. Just like the other sections of Title 7 of Book 3 DCC, Section 3:171 DCC pertains to the rights, powers and obligations of (joint owners in) a community under substantive Dutch law. What the term 'community' must be taken to mean and what the relationship between joint owners should be is an issue that is governed by Dutch property law.[140]

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[139] Shell's statement of defense on appeal in the motion to produce documents, par. 53.

[140] See, for example, also the District Court of The Hague 24 August 2011 (*Playgo v. Trends2Com*) ground 4.2: "Based on the above, the District Court establishes that Belgian law applies to the community and thus to the questions regarding the authority to act in respect of the community that the parties raised in claim and in counterclaim" (this decision is available via www.iept.com, no. IEPT20110824, visited on 21 December 2014). Subsequently, in District Court of The Hague 14 December 2011 (*Playgo v. Trends2Com*), the

111. The question regarding who is entitled to act as heir must be answered according to applicable Nigerian law. This follows from Section 10:145(2) DCC in conjunction with Article 3(1) of the Hague Succession Convention (1989). Thus, the question regarding whether in the event of succession a 'community' is involved and who is authorized to act in that case is also answered according to Nigerian law rather than Dutch law.

112. Under Nigerian law, succession is primarily determined by customary law. In general, in the Niger Delta the firstborn son inherits his father's (exclusive) possessions and property.[141]

> A close examination of the various customs by the available data from the field research reveals that the prominent nature of inheritance among these communities is patrilineal. Inheritance is said to be patrilineal in nature where an estate/property is inherited from one's father or other paternal ancestor. This basically means the inheritance of property through the male line.
>
> Among the various communities in the South- East geopolitical zone [..] and the South-South geopolitical zone [...], the patrilineal inheritance is on the basis of primogeniture. [...]
>
> In the ordinary parlance, primogeniture is defined as the 'system in which the oldest son in a family receives all the property when his father dies'. It is in the state of being the first born son among siblings which vests such first born son with the right to inherit his ancestor's estate to the exclusion of the younger siblings. This ordinary English definition of primogeniture reflects the position of primo genitive inheritance under customary law of inheritance and succession in Nigeria.[142-143]

113. With regard to Eric Dooh, the customs and traditions of the Ogoni – of which he is part – apply in particular. What Ogoni customary law stipulates in this regard is explicitly demonstrated by the statement dated 26 March 2013, which was drawn up by the Goi Council of Chiefs and Elders; the statement is submitted as **Exhibit P8**:

> 1. That according to the customs and Traditions of our people (Ogoni) it provides that the Eldest son from the legitimate wife becomes the successor at the event of the deceased of the father (…)

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District Court only addressed Section 3:171 BW after it had concluded that, based on the choice of law, Dutch law rather than Belgian law applied.

[141] Ogoniland and Rivers State are part of Nigeria's "*South-South geopolitical zone*" mentioned in the quote in the body text.

[142] Nigerian Institute of Advanced Legal Studies, *Restatement of Customary Law in Nigeria*, Lagos (29 April 2013), p. 107.

[143] See also Reginald Akujobi Onuoha, Discriminatory Property Inheritance Under Customary Law in Nigeria: NGOs to the Rescue, http://www.icnl.org/research/journal/vol10iss2/art_4.htm (visited on 21 December 2014): "The right of the eldest surviving son to succeed his father in the headship of the family is automatic and arises from the fact of seniority. Only the father, as the owner and creator of the family property, can deprive the eldest son of this right, by a valid direction made with the aim of ensuring that the affairs of the family are properly managed by a person qualified on the grounds of intelligence and education to do so. In the absence of any such direction by the father, the right of the eldest son cannot be taken away without his consent."

> 3. We write to affirm that Mene Eric Barizaa Dooh has the legitimate right being the eldest son of the late Chief (Deacon) Mason [*sic*] Teteh [*sic*] Dooh, who had also been given the traditional stool of his father (…) which symbolizes the transfer of ownership of the father to the son.

114. **Exhibit P9** further contains a written statement by Barizaa Manson Tete Dooh dated 12 May 2011, in which he appoints his son Eric as his successor. In this regard, he explicitly writes that Eric Dooh will inherit the 'leadership' of the dynasty from him and will take over the business. Since his father's death, Eric Dooh has, in fact, been at the head of the Dooh family.

115. In short, after Barizaa Manson Tete Dooh's death, as the eldest son, Eric Dooh became the head of the Barizaa family; currently, as heir and owner, he is authorized to continue the proceedings of his father.[144] As such, he takes the position of his father in the current proceedings.

116. Moreover, it is an established fact that the *Head of Family* is also independently authorized in Nigerian customary law systems in which the property qualifies as family possessions.[145] Moreover, in general, Nigerian law does not recognize any obligation to act in a representative capacity.[146] However, once again, the case at issue does not involve family possessions.

117. The customary law rule mentioned above is widespread and widely known in Nigeria. Moreover, as future head and heir, for years Eric Dooh has been acting together with or as representative of his father, including in respect of Shell. Thus, the "lack of knowledge" contended by Shell cannot mean that there was any uncertainty on Shell's part about Eric Dooh's position in this regard.[147] Shell's admissibility defense does not seek to safeguard any right to be respected in law on the part of Shell, given that this defense exclusively seeks to still withdraw the dispute in one of the parallel proceedings from the assessment by this Court of Appeal. Eric Dooh is convinced that the type of claims in the current proceedings – a declaratory judgment and taking precautionary measures against further pollution – do not constitute any reason to invoke a Dutch law rule that seeks to prevent property law complications in case of succession and the division of an estate.

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[144] For the sake of completeness, it is noted that as *Head of Family*, Dooh may have a responsibility to let his family members benefit from that property (and related claims). However, in the case at issue it is only relevant that as head of the family and owner, Eric Dooh is deemed to have suffered the damage and that he is the only party who is authorized to conduct these proceedings against Shell.

[145] See, for example, *Kareem v. Ogunde* (1972) 1 All N.L.R. (Pt. 1) 73 and *Folami v. Cole* (1990) 2 NWLR (Pt. 133) 445: "It is not in dispute that the management of family land or property is the responsibility of the Head of Family"; see also the Supreme Court in *Ojukwu v. Ojukwu & Anor* (2008) 12 SC (Pt III) 1: "This is also settled, that a head of family, (as in the instant case) can take an action to protect family property without prior authority of the other members of his family." An important part of Nigerian case law can be accessed via the website http://lawpavilionplus.com/.

[146] See also Chapter 5 regarding right of action. One exception to this rule is the sale of family possessions, which requires the consent of the members of the family.

[147] Other than in the cases that Shell mentioned in this connection: HR 10 June 1983, *NJ* 1984, 294 (*Tridon/Island GEM*) and HR 4 April 2004, *NJ* 2006, 71.

118. With the above, Eric Dooh believes that he has sufficiently demonstrated that he is entitled to continue the proceedings at issue and that Shell's argument must fail. To the extent that this Court of Appeal nevertheless demands additional evidence of the fact that Eric Dooh is the heir, that he is entitled to his father's claims and that he is authorized to continue the proceedings of his father (for example by a further expert opinion regarding Nigerian law or a statement by his brothers and sisters), he offers to furnish such evidence.

## 5. RIGHT OF ACTION OF THE NIGERIAN PLAINTIFFS

### 5.1 Introduction

119. In the final judgment, the District Court concluded that for the right of action of the Nigerian plaintiffs, in view of Shell's own arguments in the statement of rejoinder, it is sufficient that they were in possession of the contaminated lands and fish ponds and that they do not have to prove their ownership – let alone their exclusive ownership – of these lands and fish ponds.[148] In the final judgment, the District Court further concluded that the Nigerian plaintiffs sufficiently substantiated the possession of their lands and fish ponds and that the statements by the local communities sufficiently demonstrate the location of the lands and fish ponds in question.[149] Where Shell currently argues that under Nigerian law, right of action is connected with (exclusive) ownership (for example in its statement of appeal (phase 1), par. 154 and following), this argument immediately fails as a result of Shell's recognition[150] in the first instance that possession is also sufficient; moreover, this defense only pertains to the action for damages.

120. Shell wrongfully assumes that (i) Dooh, Efanga, Oguru and Akpan (hereinafter also: 'Dooh et al.' and 'the Nigerian plaintiffs') base their claim (only) on their (exclusive) ownership of the land and fish ponds.[151] Subsequently, Shell contends (ii) that Dooh, Efanga, Oguru and Akpan "must demonstrate that they exclusively own or exclusively possess any of the lands and fish ponds that were contaminated as a result of the oil spill […] and how they acquired that ownership or that possession. Failing this, they have no right of action and are therefore not entitled to the production of documents".[152] Both of Shell's assumptions are incorrect.

121. Shell's defense exclusively pertains to rights that the Nigerian plaintiffs can or cannot exercise as a result of the alleged ownership or possession of fish ponds and

[148] Final judgments Oguru and Efanga, ground 4.17; Akpan, ground 4.16; Dooh, ground 4.17.
[149] Final judgments Oguru and Efanga, ground 4.18; Akpan, ground 4.17; Dooh, ground 4.18.
[150] Cf. the statement of rejoinder (Dooh), par 67. Consequently, Shell's defense that (exclusive) ownership of land and fish ponds allegedly is a requirement for the right of action of the Nigerian plaintiffs in the main action as well as in the motion to produce documents is covered in the sense of Section 348 DCCP.
[151] Shell's statement of appeal Shell (phase 1), par. 151.
[152] Shell's statement of appeal (phase 1), par. 163.

land. Thus, this only involves part of (the basis of) their claim. This means that Shell's defense is not so extensive that if it is held to be valid, other claims of the Nigerian plaintiffs – such as the claim based on their fundamental right to a clean living environment or loss of income – are further disregarded. After all, currently only a declaratory judgment of liability on account of acting unlawfully is at issue.

122. The consequence is (i) that (exclusive) ownership or possession is not a decisive factor for the general right of action of the Nigerian plaintiffs and (ii) that (exclusive) ownership or possession cannot be a decisive factor in answering the question regarding whether the Nigerian plaintiffs can have a legitimate interest in access by virtue of Section 843a DCCP, either.[153] In par. 5.2 below, Milieudefensie further explains why Shell's defense currently lacks relevance. Subsequently, in par. 5.3, Milieudefensie explains why Shell's defense – should this Court of Appeal feel that it must nevertheless deal with this defense – cannot succeed.

## 5.2 Ownership question not a decisive factor for right of action

123. Whether or not the Nigerian plaintiffs exclusively own or possess land and fish ponds is not a decisive factor in determining their general right of action in the main action, nor in answering the question regarding whether they have a legitimate interest in their claim by virtue of Section 843a DCCP.

124. According to Shell, "in the Initiatory writs of summons, the Nigerian plaintiffs based their claims on the argument that they allegedly are the (exclusive) owners of lands, plants and trees, and fish ponds that were allegedly damaged by the oil spills […]. The adoption of this position gave Shell a reason to take the position that the Nigerian plaintiffs must prove their right of action."[154]

125. Dooh, Efanga, Oguru and Akpan base their claim on their right to a clean living environment and further on Shell's negligence, as a result of which they suffered damage. They do not base their claim on their ownership or possession alone. They already explained this in the initiatory writ of summons and subsequently specified and explained this both in the documents and at hearings, lastly extensively in Chapter 2 of their statement of appeal against the judgment in the motion to produce documents (which is referred to here).[155] The writ of summons on which Shell bases its argument contended as follows by way of example in respect of Dooh:

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[153] In this connection, it is pointed out that Shell's grounds for appeal regarding the right of action of the Nigerian plaintiffs are exclusively directed against the final judgment of the District Court of The Hague dated 30 January 2013 (Shell's statement of appeal (phase 1), footnote 141). Dooh et al. believe that the arguments that Shell put forward against their right of action only play a role within that context of the main action and lack relevance for the assessment of their rights by virtue of Section 843a DCCP.

[154] Shell's statement of appeal (phase 1), par. 151.

[155] See *inter alia* the statement of reply in the motion to produce documents (Dooh), par. 107-110; statement of reply in the main action (Dooh), Chapter 3; Milieudefensie et al.'s statement of appeal (phase 1), Chapter 2.

> 342. The farm and fish farm of Dooh covers 12.5 hectares along the Goi creek. On his farm there are several fish ponds and various types of trees and plants. Before the spills of August 23, 2003 and October 10, 2004, plaintiff Dooh had a healthy and abundant fish population in these fish ponds. During the spills, the oil leaked into the fish ponds; as a result, the fish population died and the fish ponds can no longer be used for breeding and catching fish. Moreover, the fire that followed the spill of October 10, 2004 caused additional destruction. As a result of the fire, the trees and plants Dooh planted in the area that was affected by the spills have been destroyed. These (valuable) trees and plants not only provided shade and protection from the wind for the fish ponds, but also provided the raw materials for products like raffia palm, bamboo, avocados, bread fruit, coconuts and mangos. The plaintiff's crops intended to be used as food – such as cassava, coco yams, pineapples, okra and pumpkins – were also destroyed. This has impaired his right to maintain himself and his source of income has fallen away. In addition, the damage consists of a decrease in value of the land and the fish ponds. Moreover, his living environment has been seriously affected. As a result of the oil pollution of the soil and drinking water, Dooh is also suffering future damage to his health to the extent that such damage has not yet manifested itself.
>
> 343. As a result of this environmental disaster, Dooh is suffering damage as a result of impairment of his living environment, his health, his property and his capacity to earn income.[156]

126. In this light it is not clear why Shell maintains that Dooh et al. allegedly base their claim on (exclusive) ownership or possession (alone). Nor is it clear how the question regarding whether Dooh et al. have exclusive ownership or possession could be a decisive factor in determining their general right of action regarding these different forms of infringement and damage, or their right to the production of documents by virtue of Section 843a DCCP. The fact that Shell apparently does not believe this, either, is demonstrated by its comment in the statement of rejoinder: "Shell has never contended that in general, only the exclusive owner can initiate a claim for damages".[157] In this context it is also pointed out that Dooh et al. not only have an interest in a declaration of unlawfulness in view of a claim for damages to be initiated, but they also seek recognition of the infringement of their fundamental right to a clean living environment; moreover, they claim that Shell takes measures to prevent further damage.

127. Despite this, Shell currently raises the issue of the basis of the claim once again, apparently for the purpose of arguing that Dooh et al. do not have (and cannot have) a legitimate interest in access by virtue of Section 843a DCCP, because they allegedly have no right of action. To the extent that this is indeed the purport of Shell's argument it must fail, because Shell failed to explain how and why its argument could lead to a lack of legitimate interest, given that Dooh et al.'s claim is not based exclusively on ownership of the lands and fish ponds that is contested by Shell. After all, Shell fails to explain why and based on what rule the Nigerian

[156] Writ of summons (Dooh) par. 342, 343. Cf.: Writ of summons (Oguru, Efanga), par. 336-338; Writ of summons (Akpan), par. 357-359.
[157] Shell's statement of rejoinder (Dooh), par. 67.

plaintiffs are allegedly required to prove that they exclusively own or exclusively possess the lands or fish ponds, for example in order to initiate their claim to terminate the infringement of their right to a clean living environment or to claim compensation for the loss of income they suffered.[158] In short, Shell is wrongfully attempting to reduce the scope of this case to an ownership issue; moreover, Shell bases its arguments on an incorrect application of Nigerian law.

128. Under Nigerian law, the right to be allowed to initiate a claim and submit this claim for assessment to the court is referred to as *locus standi* or *standing.* Under established Nigerian case law, a person has *locus standi* "*if he has shown sufficient interest in the action and that his civil rights and obligations have been or are in danger of being infringed*".[159] If, as in the proceedings at issue, a claim comprises an order to act, a plaintiff has *locus standi* "*where the reliefs claimed would confer some benefit on such a party*".[160] The Nigerian Supreme Court further held that "*a person who is in imminent danger of any conduct of the adverse party has the locus standi to commence an action*".[161] Thus, Nigerian case law clearly demonstrates that to the extent that Shell wants to argue that Dooh et al. do not have any *locus standi* in the current proceedings, Shell's defense must fail:

> The Court should exercise utmost caution in throwing out a case because of the issue of locus standi […]. Where the court conceives that a proponent of a matter is somehow connected to a dispute in which he feels that he should exercise his right of access to the court to protect his own interest or indeed ground interest, he should not be shut out as long as it can be discerned from the pleadings that he had a protectable interest of some sort.[162]

129. As stated before, Dooh, Efanga, Oguru and Akpan *inter alia* claim a declaratory judgment to the effect that their fundamental right to a clean living environment has been violated; in addition, they claim measures to prevent this violation from being continued and repeated. The status of owner or possessor is irrelevant for this claim; exclusive ownership or exclusive possession of the polluted lands and fish ponds is certainly not a requirement. This follows principally from the nature of fundamental rights, to which individual persons and peoples are entitled on their own account and

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[158] Moreover, as will be explained once more below, Dooh et al. sufficiently demonstrated their right of action regarding land and ponds.

[159] Nigerian Supreme Court in *Ojukwu v. Ojukwu & Anor* (2008) 12 SC (Pt III) 1. Further: Abdulkadir J.C.A. in *Okoye & Anor v. Beatitudes Nigeria Limited*, (2014) LPELR-2014(CA); *Olagunju v. Yahaya* (1998) 3 NWLR (PT.542) 501, *Okafor v. Asoh* (1999) 3 NWLR (PT. 593) 35, *Nnubia v. A.G. Rivers State* (1999) 3 NWLR (PT.593) 82, *Ogunmokun v. Mil adm*; Osun State (1999) 3 NWLR (PT.594) 261, *Ibrahim v. Inec* (1999) 8 NWLR (614) 334 and *Guda v. Kitta* (1999) 12 NWLR (PT.629) 21. "A Plaintiff or Claimant cannot have locus standi in a matter, unless he is able to show that he has interest or that he has sufficient or special interest in the performance of the duty which he seeks the Court to enforce, or that his interest has been adversely affected", *Nnoli & Anor. v. Nnoli & Anor* (2013) LPELR-20633(CA). An important part of the Nigerian case law can be accessed via the website http://lawpavilionplus.com/.

[160] *Oloriode & Ors v. Oyebi & Ors* (1984) 5 SC 1.

[161] *Attorney General of Lagos State v. Eko Hotels Ltd & Anor* (2006) 9 SCNJ 104; *Barr. Amanda Pam & Anor v. Nasiry Mohammed & Anor* (2008) 5-6 SC (Pt. I) 83.

[162] *Ladejobi & ors v. Oguntayo & ors* (2004) 9-12 SCM (Pt. 1) 105.

the protection of which does not depend on (and may not be made dependent on) specific ownership or possession relationships. This starting point is also specified in Nigerian procedural law in the FREP Rules (2009). These rules consider:

> (e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
> (i) Anyone acting in his own interest;
> (ii) Anyone acting on behalf of another person;
> (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
> (iv) Anyone acting in the public interest, and
> (v) Association acting in the interest of its members or other individuals or groups.

130. Moreover, Dooh et al. suffered damage to their health as a result of the oil pollution. The question regarding ownership rights is irrelevant for this issue, as well. This also applies to the extent that Dooh et al.'s claims are based on their loss of income: if and to what extent they own the lands and fish ponds that realized the proceeds from which they generated their income is irrelevant in this regard.

131. Nor is ownership or possession of the underlying land required for damage that is related to working that land (which is discussed in more detail below) or to *fishing rights*. In Nigeria, the right to fish in *tidal waters* has been acknowledged since 1914. This right was continued by the Supreme Court in *Adeshina v. Lemonu*.[163] The Court of Appeal found as follows in *SPDC v. Edamkue*:

> (…) It follows from the above statement of the law by the Supreme Court that the Plaintiffs in this case can claim in respect of losses they suffered by the pollution of the rivers, ponds, etc. which they were using for fishing purposes. …. The law is that a private individual has a right of action for public nuisance if he can establish that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public. Such individual is also permitted to institute proceedings in his own name in respect of an injury sustained from a public nuisance.… The plaintiffs in the present case alleged that as a result of the oil spillage which arose from the defendant's oil exploration, they suffered losses in that there was extensive damage to the rivers, fish ponds, forests and vegetation from where they make their living. It is therefore not in doubt that they can claim for their losses.[164]

132. Thus, the question regarding (exclusive) ownership or possession of the lands and fish ponds can only play a role in connection with the damage on account of a decrease in value of such ownership or possession. Given that this is just one aspect of the tort specified by Dooh et al. and the declaration of liability for 'torts' that he claimed in that connection, it is not clear how Shell's arguments can lead to its

[163] *Adeshina v. Lemonu* (1965) NSCC, p. 177.
[164] *SPDC v. Edamkue*, (2003) 11 NWLR 533, no. 42 with Cited Cases Ladan & Ako, Exhibit L1 (Dooh). See, for example, also the ruling in *Elf (Nig) Ltd. v. Sillo* (1994) 6 NWLR (Pt.350) 258.

conclusion that in general, the Nigerian plaintiffs do not have any right of action and they "are therefore not entitled to the production of documents, either".[165]

### 5.3 No exclusive ownership required for a claim regarding land or ponds

133. Thus, the question regarding whether Dooh et al. are the (exclusive) owners or possessors of the polluted land and fish ponds only becomes an evidence issue in the event that the subject of liability for damage as a result of a decrease in value must be dealt with. Shell's defense cannot lead to the conclusion that in general, Dooh et al. do not have a right of action. For the sake of completeness, below Milieudefensie will nevertheless explain why Shell's defense cannot succeed for the rest, either.

134. Shell contends that in Nigeria, in principle, land – and plants and trees and fish ponds on this land – are owned by the community; occupying or using that land does not mean that a member of the community also acquires exclusive ownership or possession. According to Shell, for that reason, a claim "based on that ownership […] must be initiated by the community (i.e. all members of the community)". Shell notes that this does not apply, of course, if an individual member of that community exclusively owns or exclusively possesses a certain portion of land; however, in that case, the person in question must prove how he acquired the (exclusive) title to that land.[166] Because in the case at issue, the plaintiffs do not act in a representative capacity, Shell believes that they must demonstrate that they exclusively own or exclusively possess the land and fish ponds.

135. Shell's argument is (irrelevant and) substantively incorrect. This is explained below along the following lines. To the extent that Dooh et al.'s claim pertains to the land and fish ponds, first and foremost, they have *sufficient interest* in their claim, as well. First of all, this follows from the fact that irrespective of their rights to underlying land and ponds, they are entitled to compensation for damage to the *crops*, *buildings* and *economic trees* on this land. They also have a right of action as possessor of land and fish ponds. Moreover, under Nigerian law it is perfectly possible (and also customary) that a person protects his personal interests in law, even if this involves possessions or property of the family. Oditah's argument that in such a case only a representative action can be brought is incorrect. Shell's defense that Dooh et al. allegedly do not have an adequate title to the ownership or possession further serves to protect a party invoking a better title and not to protect a third party by way of a procedural defense. In other words, under Nigerian law, Shell cannot invoke such a defense on account of a lack of interest. In addition to the above, Dooh et al. most certainly have sufficiently demonstrated that they are also the owners of the land and fish ponds, even though – as stated before – their right of action does not depend on this.

[165] Shell's statement of appeal (phase 1), par. 163.
[166] Shell's statement of appeal (phase 1), par. 155.

136. Thus, Shell wrongfully contends that Dooh et al. must demonstrate that they are the (exclusive) owner or exclusive possessor of the land and fish ponds at issue before they have a right of action. All this has already been set out at length in the opinion of Ako and Ladan, in the statement of reply and, especially, in Duruigbo's opinion. For the sake of convenience, the main points of this are expressed once more below.

137. Under Nigerian law, the right of action is determined by whether a party has sufficient interest in the claim he initiated.[167] In addition to the interests mentioned above, this interest may also pertain to the land and fish ponds that they occupy and use, irrespective of whether they exclusively own or possess that land or those fish ponds. Article 11(5) of the Oil Pipelines Act stipulates: "*the holder of a license shall pay compensation (a) to any person whose land or interest in land … is injuriously affected … and (b) any person suffering damage by reason of any neglect to protect, maintain or repair…*" According to Article 20(2) of this same Oil Pipelines Act, in addition to *"value of the land"* and *"interests in land"*, this also involves *"any damage done to any buildings, crops or profitable trees".*

138. Thus, in any event, Dooh et al. have a right of action based on *negligence* regarding the (crops etc. on) the land and fish ponds they worked, as well as the buildings they erected on this land, irrespective of whether they qualify as the exclusive owners or exclusive possessors of the land. In this connection, Shell's argument in the statement of appeal – which has not been further substantiated – that "in Nigeria, in principle, land – *and plants and trees, and fish ponds on this land* – is owned by the community (*'community'*) or clan (*'family'*) in question" is incorrect [emphasis added by attorney]. In his opinion, Duruigbo explained that the so-called annexation principle – which allegedly demonstrates that improvements made and buildings erected by the plaintiffs automatically accrue to the owner of the underlying land – does not apply under Nigerian customary law.[168] See also Akintan JSC in *Ibator v. Barakuro*:

> The position in law is that it is possible for a tenant on or an occupier of a parcel of land to successfully claim damages for his properties, including farm crops, damaged on the land. He needs not prove title to such land before he could succeed. All he needs to establish is that his property on the land was damaged. It follows therefore that the contention of the appellants that the respondents were not entitled to succeed because they failed to prove title to the land is totally erroneous.[169]

139. Moreover, as the District Court of The Hague rightly concluded in its final judgment against which decision Shell currently did not direct any grounds for appeal, the cultivation of the land and ponds by Dooh et al. demonstrates that Dooh et al. qualify as possessors of land and fish ponds,[170] so that on this account, as well, they have an

[167] For *locus standi*, see par. 128 above.
[168] See further the statement of reply (Dooh), par. 56 and following; opinion of Ladan and Ako, par. 7 and following (Dooh).
[169] *Ibator v. Barauro* (2007) 9 NWLR (Pt.1040) 475
[170] Final judgments Oguru and Efanga, ground 4.18; Akpan, ground 4.17; Dooh, ground 4.19.

interest and a right of action.[171] However, Shell adds a criterion of its own to this, contending that this possession must be *exclusive*.

140. Shell does not contend anything demonstrating why and based on what rule in the law or case law the Nigerian plaintiffs – in light of their claim – must allegedly demonstrate that their possession or ownership of land or fish ponds is "exclusive". Shell only contends that "the mere circumstance that a member of [a] community or clan "occupies and uses" part of [...] land does not mean that he acquires exclusive ownership or possession in respect of that community". Dooh fails to see the relevance of this argument. After all, the District Court concluded that the plaintiffs in any event qualify as possessors and that this also sufficiently establishes their right of action. Shell does not direct any ground for appeal against the District Court's establishment that the Nigerian plaintiffs qualify as possessors of the lands and fish ponds, but only contends that (this is allegedly insufficient because) in order to assume a right of action or entitlement to the production of documents, the possession must be "exclusive".

141. Nigerian law does not recognize such a distinction between 'possession' and 'exclusive possession'. The fact that in its statement of appeal – just as in its previous documents – Shell does not offer any substantiation for its argument that under Nigerian law, only an *exclusive* owner or possessor could initiate a claim is not very surprising, because no basis or precedent can be found for this in Nigerian (case) law. On the contrary, a review of Nigerian law leads to the opposite conclusion.[172]

142. The question that precedes Shell's defense is whether this (exclusive) title determines the interest in a claim. That is not the case here. In Nigeria, even a *trespasser* of a parcel of land can exercise rights in respect of third parties – except the owner.[173] *Title to land* only becomes an issue if another party invokes his title to the same parcel of land; in other words, in cases in which the title is the point in dispute between two parties. All cases that Oditah cites in his previous opinions and that apparently must serve to support his argument that the plaintiffs must prove their right of action by demonstrating their exclusive title are such *land claim* cases. However, Dooh et al. do not claim any *declaration of title*; nor does Shell contend that it allegedly has better rights in respect of land and ponds.

143. Thus, Shell is not entitled to its defense that Dooh et al. allegedly do not have any right of action because they do not have exclusive ownership or possession.[174] Duruigbo explains at length that the *ius tertii* defense to the effect that a third party allegedly has better rights is not accepted under Nigerian law.[175] This also means that Shell's defense that Dooh et al.'s claim could have been initiated only by way of

[171] See Duruigbo's opinion, Exhibit M1 (Dooh), par. 15-25.
[172] See *inter alia* Duruigbo's opinion, Exhibit M1 (Dooh), par. 21.
[173] Duruigbo's opinion, Exhibit M1 (Dooh), par. 24.
[174] See also: the statement of reply (Dooh), Chapter 3.1.
[175] Duruigbo's opinion, Exhibit M1 (Dooh), par. 26-39.

representative claim cannot help Shell. With reference to the relevant case law, Duruigbo states the following in this regard:

> SPDC, who is not even claiming any interest in the land, cannot be allowed to defeat the plaintiff's case. The plaintiffs have sufficiently asserted their interest. It is not for the defendant to allege that the plaintiffs' title is defective or that another party has a better or the only claim to the land. If such party exists, such party should come to court to advance its interests. No Nigerian Court will accept the position of Oditah and SPDC to the contrary.[176]

144. Thus, this was the reaction of Tobi J.S.C. of the Nigerian Supreme Court, when SPDC attempted to get this same defense accepted in other proceedings:

> I hold that the Appellant has no locus standi to object to the said representation not being a member of those families or Communities. [...] It is only a member of that group, family or Community, who can dispute, intervene or challenge, the proper representation or the capacity in which the plaintiff/plaintiffs sued. It will be futile for a defendant who is not one of those the plaintiff/plaintiffs purport to represent, to challenge his/their said authority for or because, if the plaintiff/plaintiffs wins/win, the losing defendant, cannot share in the victory and if the plaintiff/plaintiffs case be dismissed, such dismissal, can never affect the defendant adversely. See the Cases of Chief P. O. Anatogu & ors. v. Attorney-General, East Central State (1974) 4 ECSLR 36; (1976) 11 S.c. 109; Oyemuze & ors. v. Okoli & ors. (1973) 3 ECSLR 150; Alhaji/Chief Otapo & ors. v. Chief Sunmonu & ors. (1987) 2 NWLR (pt.58) 587@ 603; (1987) 5 SCNJ 57; (1987) 2 NSCC Vol.18 P. 677and Daniel Awudu & anor. v. Bautha & anor. (2005) 2 NWLR (Pt.909) 199@222-223 CA. citing the cases of Anatogu v. Attorney-General, East Central State; Chief Otapo v. Sunmonu (supra) and Busari v. Oseni (1992) 4 NWLR (Pt.237) 557. Per OGBUAGU, J.S.C. (Pp. 33-34, paras. A-B).[177]

145. Moreover, in contrast to what Shell argues, Nigerian law does not recognize any obligation to initiate a representative action – not even if the land at issue belongs to the family or community. After all, an individual person can always represent his own interests.[178] Under Nigerian law, the representative action is an available concept that serves judicial efficiency. Initiating an action in a representative capacity prevents members of a community or family who are in the same situation

[176] Duruigbo's opinion, Exhibit M1 (Dooh), par. 28.

[177] *SPDC v. Edamkue*, (2009) 14 NWLR (Pt. 1160) 1 SC.

[178] The fact that in the event of family possessions, as well, individual members of the family can protect their interests in proceedings has been set out in par. 3.1.1 of the statement of reply, with reference to case law of the Nigerian Supreme Court, and in Duruigbo, Exhibit M1, par. 29-33 (Dooh). See, for example, *Mozie v. Mbamalu* [2006] 15 NWLR (Pt.1003) 466: "*It is good law that members of a family can sue in respect of family property. This was the position of the two Courts below and they are right. In Dadi v. Garba (1995) 8 NWLR (Pt. 411) 12, this Court held that a member of a family has capacity to sue to protect family property. Similarly in Babayeju v. Chief Ashamu (1998) 9 NWLR (Pt. 567) 546, this Court also held that any member of the family whose interest is threatened by the wrongful alienation or wrongful interference with the family property can sue to protect his interest whether with the consent or without the consent of the other members of the family, for if he does not act he may find himself being held to be standing by when his rights were being taken away. See also Ugwu v. Agba (1977) 10 SC, 27; Melifonwu v. Egbuyi (1982) 9SC; Orogan v. Soremekun (1986) 5 NWLR (Pt. 44) 688; Olowosago v. Adebanjo (1988) 4 NWLR (Pt. 88) 275; Odeneye v. Efunuga (1970) 7 NWLR (Pt. 164) 618. It is in the light of the above authorities that I am unable to agree with the submission of learned Senior Advocate for the appellants that the plaintiffs/respondents ought to have commenced the action in a representative capacity and not in their personal capacity.*"

from having to be individual parties to the proceedings in order to exercise their claim. Obaseki J.s.c. expressed this as follows in *Obiode v. Orewere*:

> The rule [on representation] has been described as 'a rule of convenience only' (See Harrison v. Abergavenny (Marquis of) (1887) 3 T.L.R. 324 at page 325); as a rule that was originated for convenience, it has been relaxed. (See Bedford (Duke of) v. Ellis [1901] A.C. 1 at page 8). It is a rule which ought not to be treated as rigid but as a flexible tool of convenience in the administration of juria - Anatogu and Ors. v. A-G of East Central State of-Nigeria and Ors (1976) 11 SC 109.[179]

146. Thus, it is completely superfluous that Dooh, Efanga, Oguru and Akpan repeat that they are not only the possessors but also the owners of the land and fish ponds, as also explicitly stated by the communities of Goi, Oruma and Ikot Ada Udo. Shell did not conduct any concrete defense against this, but simply maintains that Dooh et al.'s evidence is insufficient. If, as Shell contends, in principle, the community has ownership or possession, it cannot subsequently – without any further substantiation – set aside the evidence furnished by that community and accepted as sufficiently convincing by the District Court as insufficient. If it is assumed that Shell has an interest in contesting that title – which is not the case in view of the above – it is currently still up to Shell to prove that there is no title or right of action. See also Article 146 of the Nigerian *Evidence Act*:

> When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.[180]

147. The statements by the community do not leave any room for doubts regarding the fact that Dooh, Oguru, Efanga and Akpan themselves can be considered to be the possessors and owners of the land and ponds in question. Nor is this exceptional under Nigerian law.[181]

148. Even if this Court of Appeal would nevertheless follow Shell's argument that Nigerian law and the current facts demonstrate that Dooh et al. are acting in a representative capacity, this still does not put their right of action at issue. Nigerian case law does not leave any room for doubts regarding the fact that in such a case, in view of the legal interest to be served, the judge may render judgment as if the claim had been initiated in a *representative capacity*. Thus, Oditah's argument that the failure to mention the representative character of a claim – even if this would have applied to the situation – renders a writ of summons "*deficient and liable to be set*

[179] *Obiode v. Orewere* (1982) 1-2 S.C. 83.
[180] See further *Ezedu & ors v Obiagwu* (1986) 1 NSCC 427.
[181] See also Duruigbo's opinion, Exhibit M1 (Dooh), as well as the *Nigerian Institute of Advanced Legal Studies*, p. 97 and pp. 106-107, cited in Chapter 4.

*aside*" is certainly incorrect.[182] N.B.: in proceedings against SPDC mentioned before, the Nigerian court found as follows:

> Even where a person sued in a personal capacity instead of in a representative capacity, an Appellate Court, can, in the interest of justice, amend the plaintiffs' capacity to reflect the evidence and enter judgment for the plaintiff as representing his family or community. See the case of Osinrinde & 7 ors. v. Ajomogun & 50rs. (1992) 6 NWLR (Pt.246) 156; (1992) 7 SCNJ (Pt.1) 79 @114 - 115. In fact, in the case of Prince Ladejobi & 2 ors. v. Otunba Oguntayo & 9 ors. (2004) 7 SCNJ 298 @310 - 311- per Uwaifo, JSC, it was held that the law is that a person has the right to protect his family's interest in a property or title and can sue for himself and on behalf of his family, in a representative capacity. The cases of Sogunle v. Akerele (1967) NMLR 58; Nta. V. Anigbo (supra); Mefifonwu v. Egbuyi (1982) 9 S.C 145 @ 159 and Chief Atanda & ors. v. Akunyun (stated therein as Olanrewaju) 1988 4 NWLR (pt. 89) 394 were therein referred to, (it is also reported in (1988) 10 - 11 SCNJ 11). See also the cases of Coker v. Oguntola & ors. (1985) 1 ANLR (Pt.1) 278; Alhaji Gegele v. Alhaji Layinka & 6 ors. (1993) 3 SCNJ 39 @45; (1993) 4 KLR 51 and Awudu & anor. v. Daniel & anor. (2005) 3 NWLR (pt. 909) 199 @ 222 - 223 CA. Even if the trial court did not effect the amendment, as shown above in the decided cases, the court below, has the power to amend if it deemed it fit and just to do so. It is settled that an Appellate court can even suo motu, amend the capacity in which a plaintiff sued. See the cases of Amadi v. Thomas- Aplin & Co.Ltd (supra); Ibanga & ors. v. Usanga & ors. (1982) 5 S.C 103 @126 - 127; (1982) 1 ANLR (Pt....) 88 @ 100; Afolabi & ors. v. Adekunle & anor. (supra); Shoe Machinery Co. v. Curtlam (1896) 1 CH 108 @112 and Chief Akinnubi & anor. v. Grace Akinnubi (Mrs.) &2 ors. (1997)1 SCNJ. 202 just to mention but a few.[183]

149. Finally, Shell contends the right of action of the Nigerian plaintiffs, because they "have still not explained exactly where the lands and fish ponds they allegedly own or possess are located". The District Court rightly already put that defense – which, as noted before, only pertains to the claim for damages – aside with reference to the maps that Dooh, Efanga, Oguru and Akpan have submitted[184] and Shell's own arguments that it cleaned the land and fish ponds.[185] Currently, Shell contends that "the fact that SPDC remediated the consequences of the oil spill […] near [Oruma/Goi/Ikot Ada Udo] and in so doing cleaned land and fish ponds does not mean that it also knows where the lands and fish ponds of [Oguru respectively Efanga/Dooh/Akpan] are located".[186]

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[182] Opinion of 14 June 2010, par. 42, 43. See also Shell's statement of appeal (phase 1), par. 154. Once again, Shell cites from Oditah's opinion dated 21 February 2011. Oditah asserts that if there are several owners, "proceedings to vindicate that title or protect jointly owned property **must** be representative".

[183] *SPDC v. Edamkue*, (2009) 14 NWLR (Pt. 1160) 1 SC. See, for example, also *Osagunna v. Mil. Governor Ekiti State* (2001) 5 SCM 169: "*Where a plaintiff did not expressly sue in a representative capacity and there had been evidence to show he was so suing, the law in such a case is that the court should aim at doing substantial justice and save multiplicity of suits by amending the capacity in which the suit is brought s to bring it in line with the evidence. It would not matter whether or not an application for such amendment had been applied for and obtained"*.

[184] Exhibit M4 (Dooh, Oguru); M3 (Akpan).

[185] Final judgment (Dooh), ground 4.19.

[186] Shell's statement of appeal (phase 1), par. 162, 166, 174.

150. First and foremost, assuming that Shell does not know where the parcels of land and fish ponds in question are located, its defense that it certainly cleaned up does not hold. Additionally, Shell's defense cannot be taken seriously in light of the clean-up reports and other evidence that Shell submitted in order to substantiate its argument that it properly cleaned up. For example, in its statement of defense, with reference to remediation work on "the fish ponds (…) that Dooh claims to own" by three contractors designated at Dooh's request, Shell contends that "the fish ponds in question first had to be drained before the soil could be dug up". Exhibit 8 of Shell with the statement of defense is Dooh's recommendation for sub-contractors to be appointed; subsequently, Shell followed this recommendation. Exhibits 9-11 of Shell with the statement of defense are the clean-up reports of the contractors in question for "Spill pond 1-3". Moreover, Shell itself visited the locations several times. In addition, the 'Sikpoode farm' and the ponds are also the subject of Nigerian proceedings between SPDC and the late Barizaa Dooh, which have been pending for 20 years.[187] Documents from SPDC in those proceedings demonstrate that in that case, SPDC certainly knows which *ponds* and *farm* are involved.[188]

151. Moreover, if Shell had any doubts regarding the location of the areas or the presence of polluted fish ponds in those areas, it would have been obvious that Shell had demonstrated this in its response to the notice of liability in 2008 by asking questions before taking the position that it had cleaned up. Shell did not do so. To the extent that any lack of clarity could remain, this has been removed in respect of Dooh, Oguru and Efanga by submitting maps.[189-190]

152. With regard to Akpan, in this connection Shell also refers to an alleged representative claim of the Ikot Ada Udo community, which allegedly pertains to an area with the same name. With regard to that claim, in the *lis pendens* motion raised by Shell, the District Court of The Hague found that "every verifiable explanation of subjects and states of affair in those previous Nigerian proceedings (...) on which the Shell companies base their *lis pendens* motion [is absent]".[191] The District Court further found that in the Dutch and the alleged Nigerian proceedings "the parties to the proceedings are certainly not the same; to date, in many respects, those varying parties to the proceedings certainly did not submit the exact same subjects to the Dutch and Nigerian courts for assessment and a decision, let alone can the Nigerian court reasonably be expected to hand down an irrevocable final decision that can be recognized and – as the occasion arises – enforced."[192] Shell did not advance any grounds for appeal against these conclusions of the District Court. Apart from the

[187] In those proceedings, maps and reports from *estate surveyors* have also been submitted.
[188] See, for example, the *Statement of Defence*, Shell, Suit No. FHC/PH/159/97, 22 May 1998.
[189] Exhibit M4 (Dooh, Oguru & Efanga.); M3 (Akpan).
[190] In respect of Oguru and Efanga, please refer to the fact that the Olumogbogbo creek – which Shell claims it is not familiar with – is mentioned in its *Environmental Impact Assessment* regarding the Rumuekpe pipeline from 2004 (Exhibit M3, p. 3-131).
[191] District Court of The Hague, 1 December 2010, ground 7.
[192] District Court of The Hague, 1 December 2010, ground 8.

fact that it follows from the above that any representative action by members of the Ikot Ada Udo community does not stand in the way of Akpan's right of action, no pending proceedings in Ikot Ada Udo are involved; in the absence of grounds for appeal directed against the District Court's decisions, Shell's comment lacks each and every relevance.

153. In addition, with regard to Ikot Ada Udo, Shell submits a *Post Impact Assessment Report* from 2012, as well as a report from 2014, from which Shell infers that the area around Ikot Ada Udo has been properly remediated and, first of all, that this area did not contain any fish ponds.[193] Shell subsequently contends that when it places the Google maps besides the maps in its own reports, "at first glance" Shell can only conclude that possible fish ponds of Akpan cannot have been contaminated by the oil spills of 2006 and 2007. Shell fails to recognize that this is the very subject of these proceedings – its defense that it properly remediated or that the soil was not polluted cannot also serve to contest Akpan's right of action; after all, this first of all requires an assessment of the facts.

154. Finally, in this connection, Dooh et al. point out the following finding of the Court of Appeal in *SPDC v. Edamkue*:

> The facts of the present case are that the plaintiffs contended that they suffered losses as a result of the oil spillage. They are therefore entitled to institute actions against the defendant whom they believed to have caused the damages they suffered… The question whether the plaintiff's claim could not be proved without each of them strictly proving his claims for individual losses will depend on the evidence presented at the trial.[194]

155. For the sake of completeness, Dooh et al. note that the damage to their land and fish ponds has not only been contended by themselves, but has also been confirmed by the communities, has been investigated by Bryjark and Udo (Exhibit B2) and has been observed both by Milieudefensie, and by their (former) attorney, M. Uiterwaal, LL.M. In as far as this Court of Appeal deems necessary, they offer to furnish additional evidence of the precise location of the land and fish ponds at issue, for example by means of maps showing the exact coordinates to be prepared by an expert. However, they repeat their point of view that there is no reason to do this – in any event not at this stage of the proceedings.

## 6. OFFER OF PROOF

156. In the first instance, Milieudefensie et al. have already furnished a substantiation and evidence for all arguments. Therefore, they feel that no burden of proof falls on them. Superfluously, they submit a number of exhibits with this statement on appeal.

[193] Shell's statement of appeal (phase 1), par.175.
[194] *SPDC v. Edamkue*, (2003) 11 NWLR 533, no. 42 with Cited Cases Ladan & Ako, Exhibit L1 (Dooh).

157. However, should this Court of Appeal believe that Milieudefensie et al. should furnish additional evidence on any point, they are prepared to furnish such evidence, of course, for example by examining witnesses, consulting experts and/or submitting (additional) statements.

## 7. INTERIM CASSATION

158. Shell requests this Court of Appeal to allow an interim appeal in cassation in the event that it finds that one or more grounds for appeal or defenses of Shell are unfounded.[195] Shell contends that from the viewpoint of procedural efficiency, the present questions should be definitively answered first before the proceedings on the merits of the case are possibly continued in phase 2.

159. In a letter dated 20 June 2014 to this Court of Appeal, Shell's attorney still contended that the appeal should be dealt with as expeditiously as possible and that interim cassation would lead to serious – undesirable – delays.

160. Milieudefensie et al. object to allowing an interim appeal in cassation as requested by Shell. They feel that it is important that the case at issue, which has been pending for more than six years now, can be submitted to the decision of this Court of Appeal – (including) on the merits – without the further delays and fragmentation involved in an interim procedure before the Supreme Court. In view of the close connection of the current grounds for appeal and defenses with the main action, from the viewpoint of procedural efficiency is it much more desirable that an appeal in cassation is brought together with the main action. In addition, Shell advanced the same grounds for appeal and defenses several times in these proceedings; in the statement of appeal, it announced that it will continue to do so.[196]

## 8. CONCLUSION

161. The above means that all the appellant's grounds for appeal should fail. Thus, Milieudefensie et al. request that in a ruling, the Court of Appeal dismisses Shell's grounds for appeal or finds that Shell's defenses are unfounded, upholds the jurisdiction decision of the District Court of The Hague,[197] as well as the decision regarding the admissibility of Milieudefensie's claims[198] and (the final decision regarding) the right of action of the Nigerian plaintiffs[199] and orders Shell to pay the

[195] Shell's statement of appeal (phase 1), par. 180.
[196] Shell's statement of appeal (phase 1), par. 3.
[197] Dooh: District Court of The Hague 24 January 2010 and 30 January 2013; Oguru: 30 December 2009 and 30 January 2013; Akpan: 24 February 2010 and 30 January 2010.
[198] In all cases: District Court of The Hague 14 September 2011 and 30 January 2013.
[199] In all cases: District Court of The Hague 30 January 2013.

costs of the proceedings in both instances, stipulating that the statutory interest will be payable on the orders to pay the costs of the proceedings as of 14 days after the date of the ruling to be rendered in this case, and declaring the ruling provisionally enforceable.

## 9. LIST OF EXHIBITS

P1 Milieudefensie 1995 Annual Report
P2 Milieudefensie 1996 Annual Report
P3 Milieudefensie 1998 Annual Report
P4 Milieudefensie *In Actie*, February 1996
P5 Overview of 'Campaigns directed at Shell over the years' (2005-2010)
P6 Milieudefensie news report: '*Gedupeerden Shell in gesprek met topman Van der Veer*' (Victims of Shell talk with CEO Van der Veer) (6 December 2005)
P7 Statement dated 6 November 2014, prepared by the Goi Council of Chiefs and Elders
P8 Statement dated 26 March 2013, prepared by the Goi Council of Chiefs and Elders
P9 Statement by Barizaa Manson Tete Dooh dated 12 May 2011

Attorney